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FREDERICK A. HYDE, APPELLANT,

vs.

JOHN H. SHINE, UNITED STATES MARSHAL, ETC., AND FOR THE NORTHERN DISTRICT OF CALIFORNIA, ET AL.

Appeal from the Circuit Court of the United States for the Northern District of California.

BRIEF FOR APPELLANT.

WILLIAM S. WORTHINGTON,
CHARLES C. GOLE,
Counsel for the Appellant.

[illegible]

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 406.

FREDERICK A. HYDE, APPELLANT,

vs.

JOHN H. SHINE, UNITED STATES MARSHAL IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA; E. H. HEACOCK, UNITED STATES COMMISSIONER FOR THE NORTHERN DISTRICT OF CALIFORNIA, AND GEORGE E. MORSE, CLERK OF THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA.

Appeal From the Circuit Court of the United States for the Northern District of California.

STATEMENT.

This is an appeal from an order of the Circuit Court of the United States for the Northern District of California denying the appellant's prayer for writs of *habeas corpus* and *certiorari*, and dismissing his petition therefor (Rec. pp. 107–8). The proceedings, which resulted in appellant's arrest and detention, are based upon an indictment of the appellant and John A. Benson, Henry P. Dimond, and Joost

H. Schneider, found in the Supreme Court of the District of Columbia, charging them with a conspiracy under section 5440 of the Revised Statutes of the United States—

> "to defraud the United States out of the possession and use of, and the title to, divers large tracts of the public lands of the United States."

Schneider, one of the defendants in the indictment, is a resident of the State of Oregon, and the other defendants therein are residents of San Francisco, California. After the finding of the indictment in the Supreme Court of the District of Columbia a complaint was made under oath by William J. Burns before the defendant E. H. Heacock, a United States Commissioner for the Northern District of California at San Francisco, which complaint was based upon, referred to, and exhibited a copy of said indictment (Rec. pp. 10–11). Thereupon the said Commissioner, claiming to act under section 1014 of the Revised Statutes of the United States, issued his warrant, by virtue whereof the appellant was arrested and taken before the said Commissioner (Rec. p. 9). A hearing was thereupon had, at which the United States offered no other evidence of probable cause than a copy of said indictment. The Commissioner held the appellant to bail to answer said indictment in the sum of $50,000 and in default thereof committed him to the custody of the defendant Shine, the United States marshal for said Northern District of California, to await such order as the judge of that court should make in the premises, or until he should be discharged by due course of law (Rec. p. 10). Thereafter, on the 2d day of September, 1904, the judge of the said district court issued his warrant directing the removal of appellant from the Northern District of California to the District of Columbia for trial upon said indictment (Rec. p. 109). Thereupon the appellant presented his petition to the Circuit Court of the United States for the Northern Dis-

trict of California praying for the writs of *habeas corpus* and certiorari, and that upon the hearing thereof he might be discharged from imprisonment. The court heard arguments upon the petition alone, and denied the prayer thereof and ordered it to be dismissed, as hereinbefore stated. In denying said applications, Circuit Judge Morrow delivered an oral opinion which is found in the record at pages 108–117.

The petition (Rec. pp. 1–8) sets forth, amongst other things, that the indictment does not state facts showing a violation of said section 5440 of the Revised Statutes of the United States; that the Supreme Court of the District of Columbia has no jurisdiction of said cause; that the Commissioner and District Judge had no jurisdiction under section 1014 of the Revised Statutes of the United States to hold and remove the appellant to the District of Columbia for trial; and amongst other material facts set forth that at the examination before the Commissioner the Government offered in evidence only a certified copy of the said indictment; that the persons whose names are endorsed on the indictment as witnesses upon whose testimony the indictment was found, except three, were before the Commissioner at the hearing at the instance of the United States, and the petitioner demanded of the Government that those witnesses should be examined by the United States as to the allegations of said indictment, but the Government declined to introduce them, whereupon the appellant, and the other defendants mentioned in said indictment, called the said witnesses in their own behalf; that at the hearing before said Commissioner no evidence was adduced which established or tended to establish probable cause to find the appellant guilty of the offense charged in the indictment, or any offense against the laws of the United States; that the appellant has been a resident of the State of California for more than twenty years; that he has never been within the District of Columbia, except on one occasion, and then only

for the period of six hours during the year 1901, and that he did not on that occasion commit any of the offenses, or do any of the acts, with which he is charged in the said indictment; that the bulk of the transactions complained of in said indictment occurred in the States of California and Oregon and not within the District of Columbia; that it was conceded by the counsel for the Government before the said Commissioner that the United States District Courts for the Northern District of California and for the District of Oregon have jurisdiction of the supposed offense charged in the indictment; that neither of the defendants mentioned in the indictment reside in the District of Columbia, but that said Schneider resides in Oregon, and the said Benson and Dimond in California; that appellant was not found in the District of Columbia and was not a fugitive from justice therefrom; that the great majority of the witnesses who could testify to the said transactions mentioned in the indictment reside in the States of California and Oregon; that, with the exception of two persons, all of the witnesses who appeared before the grand jury and gave testimony reside in the States of California and Oregon; that in a trial of said indictment it would be necessary for appellant to examine as witnesses, amongst others, the persons from whom he acquired the titles of the base lands described in the indictment, consisting of more than one hundred persons; that they reside in the States of California and Oregon; that to secure their presence at a trial in the District of Columbia would cost the appellant more than $30,000; that the said indictment has been declared void and invalid by the United States Circuit Court in and for the Southern District of New York in an opinion rendered by Hon. E. H. Lacombe, circuit judge of said court, and a judgment was rendered by said United States Circuit Court discharging from custody petitioner's co-defendant Benson upon the ground that the indictment did not set forth facts tending to show a conspiracy

to commit an offense against or defraud the United States. The petition not only alleges the foregoing facts to be true, but also states that the evidence in the record before the Commissioner, now on file in the clerk's office of the District Court of the United States for the Northern District of California, proves them to be true. It may also be stated that many of said facts hereinbefore set forth appear by the allegations of said indictment to be true.

The petition also alleges that the petitioner's arrest and detention is in violation of the Constitution of the United States in the following particulars, to wit: 1st. In violation of Article V of the Amendments to the Constitution of the United States, in that he is held to answer for an infamous crime without a sufficient and valid indictment by a grand jury, and without due process of law; 2d. In violation of Article VI of said Amendments, in that the indictment does not inform him of the nature and cause of the accusation against him, and that the removal proceedings deny him the right of a speedy and public trial in the district where the crime is alleged to have been committed; and 3d. In violation of Article IV of said Amendments, which provides that no warrant shall issue except upon probable cause, and that the people shall be secure in their persons against unreasonable seizures. The petitioner also alleges that said removal proceedings are not authorized by section 1014 of the Revised Statutes of the United States, in pursuance of which said proceeding was instituted and prosecuted.

Assignment of Errors.

First. *Section 1014 of the Revised Statutes of the United States, under which the proceeding referred to in the petition was prosecuted, does not authorize a removal from a United States judicial district in a State to the District of Columbia.*

Second. *The Supreme Court of the District of Columbia has no jurisdiction of the alleged offense charged in the indictment referred to in the petition.*

Third. *The indictment referred to in the petition charges no offense against the United States.*

Fourth. *At the hearing before the Commissioner the evidence introduced by and on behalf of the petitioner proved that there was no probable cause for believing him to be guilty of the offense charged in the indictment, and the writ of certiorari should have issued to bring the record before the court, and upon its inspection thereof the appellant should have been discharged, even if the indictment be valid, which we deny.*

ARGUMENT.

FIRST POINT.

Section 1014 of the Revised Statutes of the United States, under which the proceeding referred to in the petition was prosecuted, does not authorize a removal from a United States judicial district in a State to the District of Columbia.

Section 1014 is as follows:

> "For any crime or offense against the United States the offender may, by any justice or judge (etc.), . . . of any State where he may be found, *and agreeable to the usual mode of process against offenders in such State*, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. . . . And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where the witness or offender is imprisoned, seasonably to issue, and of the marshal to execute, a warant for his removal to the district where the trial is to be had."

The word "district," as used in this section, does not apply to nor include the District of Columbia. Its meaning, by the whole context of "Title XIII, the Judiciary," in which title this section 1014 is found, is confined to the Federal judicial districts in the several States composing the Federal Union.

Chapter 1 of that title is entitled "Judicial Districts," and its entire contents are devoted to the geographical definitions and limitations of the several districts, all of which are situated in the various States.

Chapter 2 provides for the organization of the district courts.

Chapter 3 defines their jurisdictions.

Chapter 4 provides for the times of holding their sessions in the various districts.

Chapter 5 arranges the States into circuits and prescribes their territorial limitations.

Chapter 6 provides for the organization of the circuit courts.

Chapter 7 defines their jurisdiction.

Whenever the language "district" or "circuit," or "district court" or "circuit court" is used in the subsequent chapters of this title, it refers to the districts and circuits, and district courts and circuit courts created and organized by the early chapters of the title. This is apparent by reference to the language of many of the sections of that title. Chapter 15, relating to juries, is confined in terms wholly to the districts in the States. Wherever, in any of the sections of said title, there is any provision in respect to the District of Columbia it is mentioned by name, as in section 705, where it is provided that "a final judgment or decree of the Supreme Court of the District of Columbia" may be reviewed by the Supreme Court of the United States; and also in section 811, where there is a provision as to grand juries in the District of Columbia, where the language is—

"the circuit and district courts, and the district courts of the Territories, and the Supreme Court of the District of Columbia, may discharge their grand jurors," etc.

Sections 871 and 874 provide for depositions in the District of Columbia in suits pending elsewhere.

Section 1014, under consideration, is found in chapter 18, entitled "Procedure," which begins with section 911, and many of the sections of that chapter show that it relates entirely to districts and circuits, and district courts and circuit courts in the States.

Section 915 provides that in common law causes in the circuit and district courts, the plaintiff shall be entitled to similar remedies by attachment or other process as are provided for by the State laws in the State where the court is held.

Section 916 provides that a party recovering a judgment in a circuit or district court shall be entitled to the same process for its enforcement as are in use in the State in which such court is held.

Section 966 provides that interest on judgments rendered by circuit and district courts shall be in accordance with the law of the State in which the court is held.

Section 978 distinguishes between courts of the United States and of the territories.

Section 986 provides that writs of execution upon judgments obtained for the use of the United States in any court thereof, in one State, may run and be executed in any other State or in any Territory, thus keeping up the distinction between United States and territorial courts.

Section 988 provides that the liens of judgments and stay of execution shall be in accordance with the laws of the State wherein the court is held.

Section 990 provides that restrictions upon imprisonment for debt shall be in accordance with the law of the State in which the United States court rendering the judgment shall

sit. And so, in nearly every section, the language is indubitable evidence that the districts referred to are judicial districts in the States, and not elsewhere.

In Hornbuckle *vs.* Toombs, 18 Wall. 648–655, this court had the matter under consideration, and speaking by Mr. Justice Bradley, said:

> "The acts of Congress respecting proceedings in the United States courts are concerned with, and confined to, those courts considered as parts of the Federal system, and as invested with the judicial power of the United States expressly conferred by the Constitution, and to be exercised in correlation with the presence and jurisdiction of the several State courts and governments. They were not intended as exertions of that plenary municipal authority which Congress has over the District of Columbia and the Territories of the United States. . . . As before said, these acts have specific application to the courts of the United States, which are courts of a peculiar character and jurisdiction."

Again, in the case of Goode *vs.* Martin, 95 U. S. 90–98, the language of the court was as follows:

> "Territorial courts are not courts of the United States within the meaning of the Constitution, as appears by all the authorities."

And also in the case of Reynolds against the United Stttes, 98 U. S. 145–154, the court said upon the same general subject:

> "By section 1910 of the Revised Statutes, the district courts of the Territory have the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the circuit and district courts of the United States; but this does not make them circuit and district courts of the United States. We have often so decided. They are courts of the Territories, invested for some purposes with the powers of the courts of the United States."

McAlister *vs.* The United States, 141 U. S. 174, was a suit by McAlister against the United States to recover salary which he claimed, notwithstanding he had been suspended from the office of judge of the district court in a Territory. Section 1768 of the Revised Statutes, in force at the time of the suspension, authorized the President to suspend civil officers, "except judges of the courts of the United States." The plaintiff contended that he came within the exception, but the court held (citing the cases above referred to) that he was a judge of a territorial court, which was not within the purview of the exception.

Nor does the act of February 21, 1871, or the provisions of the present Code of the District of Columbia, have the effect of making this section applicable to the District of Columbia.

The act of February 21, 1871 (16th Stats. 419–426), afterwards section 93 of the Revised Statutes relating to the District of Columbia, provides:

> "The Constitution and all the laws of the United States which are not locally inapplicable shall have the same force and effect within the District as elsewhere within the United States."

Section 1 of the Code of the District of Columbia, approved March 3, 1901, provides that—

> "All general acts of Congress not locally inapplicable in the District of Columbia, and all acts of Congress by their terms applicable to the District of Columbia and to other places under the jurisdiction of the United States, in force at the date of the passage of this act shall remain in force except in so far as the same are inconsistent with, or are replaced by, some provision of this Code."

It will be seen that the acts of 1871 and 1901, above referred to, are substantially the same. Neither can have the effect of making section 1014, under consideration, op-

erate in the District of Columbia, for the reason that that section is locally inapplicable. It relates not to all the territory under the jurisdiction of the United States generally, but to territory in the States subdivided into districts.

The proceedings had in this case were not had in the District of Columbia, but in the State of California. They could not, therefore, be governed or in anywise affected by any law "in force 'within' the District of Columbia."

The opinion of Judge Cox, in the case of the United States *vs.* Guiteau, 1 Mackey, 563, is applicable in this connection. In that case the question arose whether section 731 of the Revised Statutes applied to the District of Columbia. It will be noticed that the language in each section relating to the District is the same. In that case Judge Cox said:

> "Several of the counts of this indictment show that the President was shot in the District of Columbia, and died of the wounds so inflicted in the State of New Jersey. It elsewhere appears that, after his death, his body was brought back to the District of Columbia.
>
> "These facts are also sufficiently shown in the evidence.
>
> "A question is raised as to the jurisdiction of this court to try and punish an offense committed under these circumstances.
>
> "It has been supposed that this case is provided for by the United States Revised Statutes, and especially section 731, which enacts:
>
> "'When any offense against the United States is begun in one judicial *circuit* and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined, and punished in either *district*, in the same manner as if it had been actually and wholly committed therein.'"

After stating that the crime of murder was not made an offense throughout the United States by act of Congress, but

only in territory under the exclusive jurisdiction of the United States, the judge further says:

> "But, besides that, the statute [section 731] refers to offenses begun in one *judicial circuit* and completed in another, and makes it punishable in either *district*. Now, what judicial circuits and districts of the United States are, is settled by law, and is easily determined. The whole judicial system of the United States is mapped out in the Revised Statutes.
>
> "Section 530 declares that 'the United States shall be divided into judicial districts as follows;' and it then proceeds to designate by name the States, and parts of States, which shall compose each district; and the District of Columbia has no part in this arrangement.
>
> "Further on, section 604 groups all these districts again into nine circuits, to which the District of Columbia is equally a stranger.
>
> "It need hardly be observed that the title, 'District of Columbia,' represents a political division, and never had any reference to the judicial system of the United States. The original judicial system of the United States was created for the States in 1789, before the District of Columbia had a separate political existence, and the latter has never been engrafted upon it by any subsequent amendments.
>
> "The provision, therefore, for punishment of offenses begun in one judicial circuit and completed in another, can have no application to offenses begun in the District of Columbia and completed within a State.
>
> "Nor is any help to the opposite view to be derived from section 93 of the Revised Statutes of the District of Columbia, which enacts that—
>
> "'The Constitution and all the laws of the United States which *are not locally inapplicable* shall have the same force and effect within the District as elsewhere in the United States.'
>
> "An act directed at offenses committed within a judicial circuit or district has precisely the same effect as if it had described the States or parts of States composing the same. If it speaks of an of-

> fense, e. g., begun in the first circuit and completed in the second, it is as if it described the very States embraced in each. Such a law would, of course, be locally inapplicable to the District of Columbia—as much so as a law to punish smuggling in California.
>
> "The only legislation which could affect the application of section 731 of the general Revised Statutes would be that which would create in the District of Columbia a judicial circuit or district.
>
> "Nor does section 760 of the Revised Statutes of the District affect this question. That section is:
>
> "'The Supreme Court [of the District of Columbia] shall possess the same powers and exercise the same jurisdiction as the circuit courts of the United States.'"

All that was said by Judge Cox in relation to section 731 applies with equal force to section 1014.

Nor does section 61 of the Code of the District of Columbia, approved March 3, 1901, alter the situation.

That section provides that:

> "The said court shall possess the same powers and exercise the same jurisdiction as the circuit and district courts of the United States, and shall be deemed a court of the United States."

It will be seen that that provision is substantially like section 760 of the Revised Statutes of the District of Columbia, quoted by Judge Cox in the opinion referred to above.

So that nothing was added by that section to the law as it then stood, except that the Supreme Court of the District should be considered a court of the United States. That, however, was really adding nothing, for this court has frequently decided that territorial courts and courts in the District of Columbia are included in the term "United States courts" and are "United States courts" in the sense that they are created by the Congress of the United States, in territory over which it has exclusive jurisdiction (see cases hereinbefore referred to, and "Embry *vs.* Palmer, 107

U. S. 3"). In that case suit was brought in the State of Connecticut upon a judgment rendered by the Supreme Court of the District of Columbia, and the question was whether it was entitled to the "faith and credit" prescribed by section 905 of the Revised Statutes of the United States. That section provides, in substance, that the records and judicial proceedings of any State or Territory or any country subject to the jurisdiction of the United States, shall have full faith and credit. In holding that the judgments of the Supreme Court of the District of Columbia come within that section, the court said:

> "As part of its general authority, the power (of Congress) to give effect to the judgments of its courts is coextensive with its territorial jurisdiction. That the Supreme Court of the District of Columbia is a court of the United States, results from the right of exclusive legislation over the District which the Constitution has given to Congress."

It has also been contended that the second section of the act of June 22, 1874, has the effect of conferring upon the district judges in the States the power to remove prisoners from a district in a State to the District of Columbia. The act is as follows:

> "An act conferring jurisdiction upon the criminal court of the District of Columbia, and for other purposes.
>
> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the criminal court of the District of Columbia shall have jurisdiction of all crimes and misdemeanors committed in said district not lawfully triable in any other court, and which are required by law to be prosecuted by indictment or information.
>
> "Sec. 2. That the provisions of the 33d section of the judiciary act of seventeen hundred and eighty-nine (1789) shall apply to courts created by act of Congress in the District of Columbia."

The substance of the thirty-third section of the judiciary act afterwards became section 1014.

It will be seen that this section only confers power upon the *courts or judicial officers in the District of Columbia.* It adds nothing to the powers and duties or jurisdiction of the courts mentioned in section 1014. If a prisoner could not be removed from a district in a State to the District of Columbia by the warrant of a district judge prior to the passage of that act, the section in question did not add that power. It may have had the effect of authorizing the proper judicial officers of the District of Columbia to remove a prisoner from the District of Columbia to one of the districts mentioned in section 1014. This is the utmost that could be claimed for it.

About the time of the passage of that act, several indictments were found in the District of Columbia against editors in several States of the Union, charging them with libel on some of the local and national officers of the Government in the District of Columbia. One of these indictments was against Charles A. Dana, of New York, and another against Buell, of Michigan, and they are referred to in the cases hereafter cited.

There seems to have been some apprehension created by these indictments amongst members of Congress that parties living in the States might, by virtue of the act of June 22, 1874, be removed to the District of Columbia for trial, and on December 15, 1874, a resolution was introduced in the Senate instructing the Judiciary Committee to inquire into the extent and meaning of the act of June 24, 1874, and whether removals to the District of Columbia could be made by virtue of it. The committee submitted a report on the 16th of February, 1875, which report gave the construction to the act which we have just indicated above, and reached the conclusion that neither under that act, or any other in force at that time, could a removal be made under section 33 of the Judiciary Act of a prisoner

from a district in a State to the District of Columbia. That report was signed by some of the most distinguished and able lawyers of that day, namely, Messrs. Edmunds, Conkling, Frelinghuysen, Wright, Thurman, and Stevens, then members of the Judiciary Committee of the Senate, and is printed as appendix No. 1 to this brief.

Attention is also called to the fact that this act was in force at the time of the opinion of Judge Cox, as to section 731, in the Guiteau case, which last mentioned opinion was delivered in 1882. It may be added that Judge Cox was a native of the District of Columbia, was very familiar with the acts of Congress and other laws in force therein, and the relations between it and the General Government, and his opinion is entitled to great weight.

The question of the meaning of the word "district," as used in section 731, was raised before this court in the recent *Burton* case, but was not passed upon, the case being decided on grounds which rendered this point immaterial. So far as we can find, after careful search, there is absolutely no case in this court where the question of the meaning of the word "district" has been passed upon as to either section 731 or section 1014.

There are several cases referred to in the Federal Reporter where prisoners have been removed from districts in the States to the District of Columbia, but there is but one case where the removal was ordered when opposition was made to it upon the ground that the court was without authority to order the removal under section 1014, and that is the case of In re Benson, now pending in this court, No. 308 (see opinion in that case, 130 Fed. Rep. 486).

In July, 1873, there was an application to remove Charles A. Dana from New York to the District of Columbia for trial, upon an information for libel filed in the Police Court of the District of Columbia. Mr. Justice Blatchford, then district judge for the Southern District of New York, refused to grant the warrant of removal, but based his refusal

wholly upon the ground that the Police Court of the District of Columbia was not authorized to empanel a jury, and that, as libel was an offense that entitled the defendant to a trial by jury, under the Constitution of the United States, it would be in violation of that instrument to remove him (In re Dana, 7 Ben. 1).

In the case In re Buell, 3 Dillon, 116, there was an effort to remove Buell from Missouri to the District of Columbia for trial, upon an indictment found in the Supreme Court of the District of Columbia, charging him with publishing a libel against Zachariah Chandler. Judge Dillon, in delivering the opinion of the court, expressed it as his opinion that the removal might be made, and referred to the act of June 22, 1874, as authorizing it; but it is evident, from an examination of his opinion, that he gave the matter very little consideration, as he discharged Buell on habeas corpus on the ground that the Supreme Court of the District of Columbia had no jurisdiction of the offense charged in the indictment.

In case of In re Dana, 68 Federal Reporter, 889, which was an application for a warrant to remove Mr. Dana from New York to the District of Columbia for trial upon an indictment for libel alleged to have been committed by him in the District of Columbia, District Judge Brown discusses the question of the jurisdiction to remove to the District of Columbia, under section 1014, as aided by the legislation hereinbefore referred to, and while he declined to base his action in the case upon the want of authority to make the removal, it is apparent from a reading of his opinion that he would have declined upon that ground if he had not found another that relieved him from the necessity of deciding that question. The ground upon which he declined the warrant was that libel, if a crime in the District of Columbia, was local, and that if section 1014 applied removals could not be made under it except for some offense

that was an offense throughout the United States by act of Congress.

The only other case, to our knowledge, bearing upon the question is that of the United States against Haskins, 3 Sawyer, 262, where Hillyer, district judge, decided that there was jurisdiction under section 33 of the Judiciary Act to remove from a district in a State to a district in a Territory. It will be noticed, by an examination of the opinion, that he assumed, without any careful consideration, that the word "district" as used in the Judiciary Act included districts in the Territories as well as the States.

The foregoing are the only cases which have come under our observation where the question here raised has been discussed, and we respectfully submit that giving to these statutes the strict interpretation which the law requires to be given in cases where personal liberty is at stake, no authority can be found in the statutes hereinbefore referred to conferring jurisdiction upon a district judge in California to issue his warrant for the removal of the appellant from the Northern District of California to the District of Columbia for trial. The only argument in favor of the power is that there is no authority for any such removal, unless it is to be found in the statutes referred to. But that is the argument of necessity, and should not prevail. In a case like the present the removal should not be made unless the jurisdiction is clear, by the express language of the law or by necessary implication. If Congress has, by oversight or otherwise, failed to provide for such a case as the present, the remedy lies not with the courts but with Congress.

SECOND POINT.

The Supreme Court of the District of Columbia has no jurisdiction of the alleged offense charged in the indictment referred to in the petition.

The crime charged in the indictment is conspiracy and

is based upon section 5440 of the Revised Statutes of the United States, which reads as follows:

> "Sec. 5440. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than one thousand dollars and not more than ten thousand dollars, and to imprisonment not more than two years."

It is shown by the allegations of the indictment and the petition that the conspiracy, if any, was entered into either in the Northern District of California or the District of Oregon and not in the District of Columbia, and nothing but overt acts in pursuance of the conspiracy were done in the District of Columbia. It follows that the Supreme Court of the District of Columbia is without jurisdiction of the indictment for conspiracy.

It is the settled law of this court that under this statute the conspiracy is the offense, and that the overt acts are no part thereof, but that the offense is complete as soon as the conspiracy is entered into.

The case of the United States *vs.* Hirsch, 100 U. S. 33, was an indictment under the above section, and the question determined was whether the statute of limitations of three years applied to the offense. The question depended upon whether the conspiracy charged in the indictment was a conspiracy to defraud the Government of revenue, or a conspiracy to defraud it generally. In the former the statute of limitations is five years; in the latter, three. The court in determining that the limitation of three years applied, held that the section as found in the Revised Statutes or the original act does not make any special reference to the revenue or the revenue laws.

In defining the offense specified in the statute, this court,

speaking by Mr. Justice Miller, at page 34 of the report, said:

> "The *gravamen* of the offense here is the conspiracy. For this there must be more than one person engaged. Although by the statute something more than the common law definition of a conspiracy is necessary to complete the offense, to wit, some act done to effect the object of the conspiracy, it remains true that the combination of minds in an unlawful purpose is the foundation of the offense, and that a party who did not join in the previous conspiracy can not under this section, be convicted on the overt act."

The case of the United States *vs.* Britton, 108 U. S. 192, was an indictment charging the defendant and others with a conspiracy, under said section 5440, to commit an offense against the United States. The offense charged was wilful misapplication of the moneys of a national bank, which is made an offense by section 5204 of the Revised Statutes. The means to effectuate the fraudulent misapplication were alleged in the indictment to be the declaration of a dividend by the defendants, directors of the bank, when there were not sufficient net profits of the association to pay it. In determining that the declaration of the dividend was not a wilful misapplication of the funds in contemplation of section 5204, this court, by Mr. Justice Woods, at pages 204–5 of the report, defining the offense of conspiracy as specified in said section, uses the following language:

> "The offense charged in the counts of this indictment is a conspiracy. *This offense does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone.* The provision of the statute, that there must be an act done to effect the object of the conspiracy, merely affords a *locus penitentiæ*, so that before the act done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the

> statute. It follows as a rule of criminal pleading that in an indictment for conspiracy under section 5440, the conspiracy must be sufficiently charged, and that it can not be aided by the averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy (Reg. *vs.* 7 Q. B. 782; Commonwealth *vs.* Shedd, 7 Cush. 514)."

The case of Dealy *vs.* United States, 152 U. S. 539, was an indictment under section 5440 R. S. U. S., charging the defendant with a conspiracy to defraud the United States out of public lands by false, feigned, illegal, and fictitious entries made under the homestead laws, and the overt act charged was the persuading of persons not entitled to make said entries to make them, and support them by false evidence. The indictment was demurred to and one of the grounds of demurrer assigned was that it did not appear that the overt acts were performed within the jurisdiction of the District Court for North Dakota in which the indictment was found. This court, speaking by Mr. Justice Brewer, in response to that point, at pages 546, 547 of the report, said:

> "Still, again, it is urged that the overt acts, the inducing and persuading, are not charged to have been done within the limits of the United States. The conspiracy is charged to have been entered into in the State of North Dakota, and the proof necessary to make final entry at the land office named would have to be used in that State. While it is true there is no specific allegation that the act of inducing and persuading was done within the jurisdiction of the court, and while it may be possible, as counsel suggest, that so far as this record discloses all the solicitation and persuasion exercised by the defendant was done within the limits of Canada, and outside the jurisdiction of the trial court, yet the solicitation was to do a wrongful act within the State of North Dakota (*In re Palliser, 136 U. S. 257, 265*), *and that solicitation was not a part of the conspiracy, but subse-*

quent to and in furtherance of it. The gist of the offense is the conspiracy. As said by Mr. Justice Woods, speaking for this court, in United States *vs.* Britton, 108 U. S. 199, 204: 'This offense does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone. The provision of the statute, that there must be an act done to effect the object of the conspiracy, merely affords a *locus penitentiæ*, so that before the act done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute.' *Hence, if the conspiracy was entered into within the limits of the United States and the jurisdiction of the court, the crime was then complete, and the subsequent overt act in pursuance thereof may have been done anywhere.*"

In the case of Bannon and Mulkey *vs.* United States, 156 U. S. 464, there was an indictment for conspiracy to commit an offense against the United States in aiding and and abetting the landing in the United States of Chinese laborers in violation of the exclusion act, by furnishing such laborers false, fraudulent, and pretended evidences of identification, etc. It was contended on behalf of the defendants that they were entitled to an acquittal because no overt act had been proved against them, although such acts were proved to have been committed by other conspirators. In holding that this contention was not well taken because the conspiracy and not the overt acts constitutes the offense, this court, speaking by Mr. Justice Brown, at page 468 of the report, said:

> "At common law it was neither necessary to aver nor prove an overt act in furtherance of the conspiracy, and indictments therefor were of such general description that it was customary to require the prosecutor to furnish the defendant with a particular of his charges. Rex *vs.* Gill, 2 B. & Ald. 204; Rex *vs.* Hamilton, 7 Carr. & P. 448; United States *vs.* Walsh, 5 Dillon, 58. But this general form of indict-

ment has not met with the approval of the courts in this country, and in most of the States an overt act must be alleged. The statute in question changes the common law only in requiring an overt act to be alleged and proved. The gist of the offense is still the unlawful combination which must be proven against all the members of the conspiracy, each of whom is then held responsible for the acts of all. American Fur Co. *vs.* United States, 2 Pet. 358; Nudd *vs.* Burrows, 91 U. S. 426, 438. It was said by Mr. Justice Woods, in United States *vs.* Britton, 108 U. S. 199, 204, that 'the provision of the statute that there must be an act done to effect the object of the conspiracy merely affords a *locus penitentiæ*, so that before the act done either one or all the parties may abandon their design and thus avoid the penalty prescribed by the statute.' If such were not the law, indictments for conspiracy would stand upon a different footing from any others, as it is a general principle that a party can not be punished for an evil design, unless he has taken some steps towards carrying it out. It has always been, however, and is still the law that, after *prima facie* evidence of an unlawful combination has been introduced, the act of any one of the co-conspirators in furtherance of such combination may be properly given in evidence against all. To require an overt act to be proven against every member of the conspiracy, or a distinct act connecting him with the combination to be alleged, would not only be an innovation upon established principles, but would render most prosecutions for the offense nugatory. It is never necessary to set forth matters of evidence in an indictment. Evans *vs.* United States, 153 U. S. 584, 594."

The foregoing cases settle the law of this court that overt acts are no part of the crime of conspiracy and not indictable, although it is necessary for some one of the conspirators to perform an overt act before the conspiracy is indictable, and that it is immaterial, therefore, where the overt act is performed. The conspiracy being the offense is

indictable, and indictable only, in the jurisdiction where it is entered into.

The following cases in the inferior Federal courts are also to the same point, and many of them refer to one or more of the foregoing cases in this court as authority:

McKenna *vs.* United States, Circuit Court of Appeals, Sixth Circuit, 127 Fed. Rep. 88.

Conrad *vs.* United States, Circuit Court of Appeals, 127 Fed. Rep. 799.

Gantt *vs.* United States, Cir. Ct. App. 5th Cir., 108 F. R. 61.

United States *vs.* Watson, 17 Fed. Rep. 145.

United States *vs.* Lancaster, 4 Fed. Rep. 896.

United States *vs.* Gardiner, 42 Fed. Rep. 829.

United States *vs.* Green, 115 Fed. Rep. 343, 351–2.

In the case last cited Judge Speer, quoting the language of Judge Benedict, in the case of United States *vs.* Donau, 11 Blatchf. 168, says:

> "The offense is the conspiracy. Some act by some one of the conspirators is required to show, not the unlawful agreement, but that the unlawful agreement, while subsisting, became operative. The offense of conspiracy is committed when to the intention to conspire is added the actual agreement; and this intent to conspire, coupled with the act of conspiring, completes the offense intended to be created by the statute, notwithstanding the requirement that the prosecution show, by some act of some one of the conspirators, that the agreement went into actual operation. If, then, an indictment correctly charges an unlawful combination and agreement as actually made, and, in addition, describes an act by any one of the parties to the unlawful agreement, as an act intended to be relied on to show the agreement in operation, it is sufficient, although upon the face of the indictment it does not appear in what manner the act described would tend to

effect the object of the conspiracy. It is sufficient if the act be so described as to apprise the defendant what act is intended to be given in evidence as tending to show that the unlawful agreement was put in operation, without its being made to appear to the court, upon the face of the indictment, that the act mentioned is necessarily calculated to effect the object of the unlawful combination charged. It is not the case of an attempt to commit crime. The crime is committed when the combination is made, and the act of one of the conspirators is not required by the statute to show the intent. That is inferred from the unlawful act of combining to defraud or to commit an offense; but the object of requiring proof of some act in furtherance of the unlawful agreement is to show that the unlawful combination became a living, active combination."

The Conspiracy, if Any, Was Entered Into and Became Complete in the State of California or in the State of Oregon, and not in the District of Columbia.

It sufficiently appears by the indictment that the alleged conspiracy was entered into, if at all, in the Northern District of California. The indictment alleges that the appellant and Benson were engaged in business in San Francisco from the 24th day of October, 1901, to the 1st day of February, 1904, and the several dates of the alleged conspiracy set forth in the indictment are all between those two dates. Besides, it also appears from the indictment, in connection with the facts, of which the court will take judicial notice, that all the acts set forth in the indictment, if performed at all, except the writing of the letters by Dimond and some payments of money set forth as overt acts, were done in the States of California, Oregon, and Washington. The applications filed in the land offices of California and Oregon, the procuring of the certificates, the making of the assignments,

the procurement of the patents, and the relinquishments of those titles to the United States, and the selection of the lieu lands must all have been done in those States. The selections of the lieu lands, by the regulations of the Land Office, of which the court takes judicial notice, were required to be made in the local land offices within whose jurisdiction the selected land is situated (see regulations paragraph 4, Appendix No. 2 to this brief). As shown by the indictment, all lands so selected in lieu of the school lands alleged to have been obtained by the defendants from the States of Oregon and California, are situated in the States of Oregon, California, and Washington. Doubtless the evidence in behalf of the Government tending to show a conspiracy would consist of these various acts. Even if this did not appear by the allegations of the indictment itself, it is alleged in the petition that the appellant has been a resident of the State of California for more than twenty years; that he has never been within the District of Columbia except on one occasion, and then only for the period of six hours, during the year 1901, and that he did not, on that occasion, commit any of the offenses, or do any of the acts, with which he is charged in the said indictment; that the bulk of the transactions complained of in said indictment occurred in the States of California and Oregon, and not within the District of Columbia; that it was conceded by the counsel for the Government before the said Commissioner that the said United States District Courts for the Northern District of California and for the District of Oregon, have jurisdiction of the supposed offenses charged in the indictment; that neither of the defendants mentioned in the indictment reside in the District of Columbia, but that said Schneider resides in Oregon and the said Benson and Dimond in California. The petition also alleges that these facts were proved before the Commissioner and are shown by the record on file in District Court for the Northern District of California.

It follows from these facts that if any conspiracy was en-

tered into amongst these defendants, it was in California or Oregon.

The Allegations of Fact Stated in the Petition for the Writs of Habeas Corpus and Certiorari Must be Taken to be True Upon This Hearing.

Section 754 of the Revised Statutes of the United States provides that:

> "Application for writ of habeas corpus shall be made to the court, or justice, or judge authorized to issue the same, by complaint in writing, signed by the person for whose relief it is intended, setting forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim of authority, if known. The facts set forth in the complaint shall be verified by the oath of the person making the application."

Section 755 of the Revised Statutes provides that:

> "The court, or justice, or judge, to whom such application is made shall forthwith award the writ of habeas corpus, *unless it appears from the petition itself that the party is not entitled thereto.* The writ shall be directed to the person in whose custody the party is detained."

As the judge below refused the writs upon the petition alone, all of the material facts properly stated in the petition must be taken to be true.

In the case of Whitton *vs.* Timlinson, 160 U. S. 242, this court said:

> "In an information for a writ of habeas corpus verified by the oath of the petitioner as required by section 754 of the Revised Statutes, facts duly alleged may be taken to be true, unless denied by the return or controlled by other evidence. But no allegation of fact in the petition can be assumed to be admitted unless distinct and unambiguous."

In that case the allegations of the petitions were in the nature of conclusions of law, and not statements of fact, and the court held that they were not to be taken as true.

The same rule applies in habeas corpus cases to the return.

Crowley *vs.* Christensen, 137 U. S. 86.

In the case of Dealy *vs.* Elton, decided by this court at the present term, the same rule was applied. That was a writ of error to the Supreme Court of California to review a judgment which denied a petition for a writ of habeas corpus. This court, in reversing the case and holding that the writ of habeas corpus should have issued, said:

> "This case is practically determined by the facts expressed in Dobbins *vs.* Los Angeles, 195 U. S. . . . It was a petition for a writ of habeas corpus to discharge Dealy from custody, in a prosecution under the ordinance under consideration in the Dobbins case. The prayer of the petition was denied and the writ discharged (Re Dealy, 139 Cal. 216; 72 Pacific, 1097).
>
> "Under the California practice, in the absence of issue joined, the allegations of the petition are taken as true and the facts alleged therein are taken as admitted (Re Smith, 143 Cal. 368; 77 Pacific, 180).
>
> "The petition made allegations attacking the ordinance which if true would render it invalid for the reasons stated in the Dobbins case, *supra*, and the petitioner upon the record made should have been discharged from custody."

It follows therefore that the statements of fact in this petition showing that the Supreme Court of the District of Columbia is without jurisdiction are to be taken as true upon this hearing.

But even if it should be held that an overt act was necessary to complete the crime of conspiracy, that would not aid the jurisdiction of the Supreme

Court of the District of Columbia in this case, for if an overt act is necessary to complete the crime, then the first overt act performed in pursuance of the conspiracy completes the offense.

This position is sustained by the holding of the courts upon the question of the statute of limitations, the rule being that the statute of limitations begins to run from the time of the commission of the first overt act, and that subsequent overt acts do not constitute a new conspiracy.

In the case of United States *vs.* Owen, 32 Fed. Rep. 134, there was a demurrer to the indictment for conspiracy, under section 5440, to defraud the United States out of public lands. The indictment showed upon its face that the conspiracy was formed and the first overt act committed more than three years before the date of the indictment, but that overt acts were committed within the statutory period. Deady, judge, in delivering the opinion of the court, said:

> "The general rule is that the statute begins to run from the commission or consummation of the crime (Wharton's Crim. Pl., sec. 321). When was this crime committed? The conspiracy was formed on July 1, 1881, and the first act done by any of the conspirators in pursuance thereof was the making of the alleged false affidavits by Ankenny on December 26, 1881, in relation to the character of the land mentioned therein. The crime was then consummated. The two elements of which it is composed—the conspiracy and the act—were accomplished, and the crime committed. On December 27, 1881, more than five (three) years prior to the institution of this prosecution an indictment might have been found against the defendants for this crime. This being so, limitation on the right to institute prosecution therefor began to run at the same time, and became a bar thereto on that day, in 1884.
>
> "In support of the prosecution it is contended that the crime was not completed until the commission of the last acts done in pursuance of the conspiracy; and that as the filing of the false description by

> Owen on December 22, 1884, and the making and using of the alleged forged affidavits by Barnhart in September and October of the same year, each took place within the three years immediately preceding the finding of the indictment, the prosecution is not barred. In this respect it is likened to or said to be a continuous crime. No authority is cited for the proposition, and on general principles I think it can not be maintained."

In the case of United States *vs.* McCord, 72 Fed. Rep. 159, which was an indictment for conspiracy to defraud the United States out of certain public lands by fraudulent homestead entries, the court directed a verdict for the defendant upon the ground that the prosecution was barred by the statute of limitations. In a carefully considered opinion by District Judge Bunn, it is said:

> "It is incumbent upon the prosecution, as an affirmative proposition in a criminal case, to make a case that is satisfactory to the jury on which the statute of limitations has not run. In a criminal case under the United States statues it is incumbent on the prosecution to show that an offense has been committed within the three years immediately preceding the finding of the indictment. . . . Now, in the judgment of the court, that has not been done in this case. . . . I do not think this thing can be split up and make a dozen or a hundred conspiracies out of one, so that for every overt act a separate indictment for conspiracy can be filed or maintained. That is not my idea of conspiracy at all. . . . Any overt act, however slight, intended to effectuate the object of the conspiracy, and whatever its character may be, whether it is itself criminal or perfectly innocent in its nature, is sufficient to fix the offense and to make it indictable. . . . No doubt a conspiracy is a continuing offense in this sense: That whenever an individual comes into a conspiracy, however late, he is considered as adopting all the previous acts of his co-conspirators and is liable in the same degree with them. But that

> it is a continuing offense in the sense that as to the first and original parties to the conspiracy this statute begins to run anew from the time of the commission of every overt act, is a contention that the court is unable to affirm. . . . As to the defendants, who . . . originated the conspiracy in March and April, 1891, and committed overt acts to effectuate its object, it seems pretty clear that the statute began to run from the time the first overt act was committed, some three years and eight months previous to the finding of the indictment."

It is apparent from what has been hereinlefore said that the first overt act to effectuate the alleged conspiracy was not performed in the District of Columbia, but in Oregon or California. The crime, if any, was then complete(even if it was not complete on the formation of the conspiracy, as we contend it was), and the statute of limitations commenced to run. Subsequent overt acts in the District of Columbia, if any, did not constitute a new offense or confer jurdisdiction upon the Supreme Court of the District of Coumbia.

Upon application for warrant of removal or upon habeas corpus while the party is in custody under such warrant, or the warrant of the Commissioner, it is the duty of the court to look into the indictment, and if it charges no offense against the United States, or is so essentially and fundamentally defective that a conviction could not be sustained thereon, or the court in which it was found has not jurisdiction of the offense, it is the duty of the court to discharge the petitioner.

In the case of in re Buell, 3 Dillon, 116, in which there was an attempt to remove Buell from Missouri to the District of Columbia, to answer an indictment which had been found against him in the Supreme Court of that district for alleged libel on the late Zacharah Chandler, the district judge of Missouri refused to gran a warrant of

removal, and discharged the petitioner on habeas corpus, from which judgment the United States appealed to the circuit court. The opinion of that court was delivered by Judge Dillon, in the course of which he said:

> "The district judge, in making this order, proceeded upon the ground that he might properly look into the indictment, and if it was fatally defective in essential averments, to constitute an offense triable in the District of Columbia, he might refuse to issue the warrant for the prisoner's removal. It is argued that the question of the sufficiency of the indictment is for the court in which it was found, and not for the district judge upon such an application (Re Clark, 2 Benedict, 540). I can not agree to this proposition in the breadth claimed for it in the present case. This provision devolves upon a high judicial officer of the Government a useful and important duty. In a country of such vast extent as ours, it is no light matter to arrest a supposed offender, and, on the mere order of an inferior magistrate, remove him hundreds, it may be thousands, of miles for trial. The law wisely requires the previous sanction of the district judge to such a removal. Mere technical defects in an indictment should not be regarded; but a district judge who should order the removal of a prisoner when the only probable cause relied on or shown was an indictment, and that indictment failed to show any offense against the laws of the United States, or showed an offense not committed or triable in the district to which the removal is sought, would misconceive his duty and fail to preserve the liberty of the citizen. *It is the constitutional right of the citizen to be tried in the district in which the offense imputed to him is alleged to have been committed, and not elsewhere* (article 2, section 2)."

In the case last cited the indictment charged that the libel was composed in the District of Columbia and printed in a newspaper called the Detroit *Free Press*, in Detroit, Michigan, and was afterwards, on a day mentioned in the indictment, published in the District of Columbia. From

these allegations the court drew the inference that the publication was in Michigan and not in the District of Columbia, although that conclusion was in opposition to the allegations of the indictment. In like manner it is apparent from the allegations of the indictment now before the court, and the physical facts of which the court must take judicial notice, that the conspiracy, if any, was formed in California or Oregon, and not in the District of Columbia.

In the case of the United States *vs.* Fowkes, in the district court for the Eastern District of Pennsylvania, 49 Fed. Reporter, 50, there was an indictment in the District Court for the Eastern District of Missouri for an offense against Fowkes and others, alleged to have been committed under the Interstate Commerce Act in the transportation of freight from St. Louis to Philadelphia. Fowkes resided in Philadelphia. It was claimed that the offense was commenced in Missouri and was completed in Pennsylvania. There was a proceeding before Butler, district judge in Philadelphia, to remove Fowkes to Missouri for trial. The district judge heard evidence as to the venue of the alleged offense, and although the indictment alleged that it was committed in Missouri, the judge found from the evidence that Fowkes had never been in Missouri, and that if he was guilty of the offense he could be indicted in Pennsylvania. He refused a warrant of removal, and discharged Fowkes upon a writ of habeas corpus.

In the course of his opinion he said, on page 53 of the report:

> "Without regard, however, to the circumstances under which indictments are found, the courts will go behind them whenever it appears that the relator's safety from unjust imprisonment requires it. The right to personal liberty is too important to be overborne by anything short of evidence that it has been forfeited. Mere matters of form and construction, based on notions of comity between courts, have no proper place in trials on habeas corpus."

The warrant was refused and the prisoner discharged on habeas corpus, and the United States appealed to the Circuit Court of Appeals for the Third Circuit, and the case was affirmed by Judges Atchison, Dallas, and Buffington (53 F. R.). The opinion was delivered by Circuit Judge Dallas, in the course of which he says:

> "We do not doubt that a district court may, in its discretion, and in a proper case, order a warrant of removal upon the indictment alone; but it would be going much further, and much too far, as we think, to hold that in all cases, and especially in such a case as this record discloses, the judge is precluded from hearing any other evidence whatever, and must, upon mere inspection of the indictment, order the removal of the accused person to a considerable distance for trial, although evidence be offered, which, if received, would conclusively establish that the court to which it is asked that he shall be remanded is without jurisdiction to try him."

Again, the judge says:

> "The course which the learned judge pursued was necessitated by the just application of essential principles of liberty in the administration of this statute, and it is supported by the considerately adopted practice of other of the courts of the United States in similar cases."

Further along in the opinion, on page 16 of the report, it is said:

> "The accused had never been within that State (Missouri). This fact is unquestioned, but it has been argued that the offense charged, though begun in the third circuit, was completed in the eighth circuit, and that, therefore, under section 731 of the Revised Statutes, it might be tried in either. In our opinion, however, the facts in this case do not bring it within the terms or operation of that section."

In the case of In re Corning, before District Judge Ricks, for the Northern District of Ohio (51 Fed. Reporter, 205), there was an indictment in the District Court of Massachusetts against various persons residing in Massachusetts, New York, Ohio, and Illinois for violation of the Sherman anti-monopoly act. The case was before Judge Ricks upon an application for a warrant of removal of the petitioner to Massachusetts. The petitioner was a resident of the Northern District of Ohio. The indictment alleged that the crime was committed in the District of Massachusetts, but the facts of which the court took judicial notice showed that if an offense had been committed it had been committed in the Northern District of Ohio.

Judge Ricks, after quoting from the opinion in the Buell case, discharged the prisoner on the grounds that the indictment was invalid and that there was a want of jurisdiction in the District Court of Massachusetts.

The case of In re Terrell, 51 Fed. Reporter, page 213, arose upon the same indictment which was before Judge Ricks in the case last quoted from. The Terrell case was before Judge Lacombe upon a writ of habeas corpus, while the petitioner was in custody of the marshal under a warrant of removal issued by the district judge for the Southern District of New York, and the petitioner was discharged, Judge Lacombe saying that he fully concurred in the opinion of Judge Ricks.

The case of In re Green, 52 Fed. Rep. 104, was the case of another defendant arrested under the same indictment. This case was before Mr. Justice Jackson, then circuit judge, upon a writ of habeas corpus, while the defendant was held in custody under the warrant of the United States Commissioner in the Southern District of Ohio. Mr. Justice Jackson reviewed many cases upon the questions under consideration, referring with approval to the opinions of Judges Ricks and Lacombe, and discharged the prisoner.

It is also to be remembered that the question of jurisdic-

tion is always an open one upon habeas corpus, even where the party is held pursuant to a final judgment of a court. Callan *vs.* Wilson, 127 U. S. 540, and cases therein referred to.

And even in civil cases wherever a judgment of a court is presented as a cause of action, or ground of defense, it may be impeached collaterally on the ground of the want of jurisdiction in the court rendering it, and facts may be pleaded and proved which contradict the finding of the record upon jurisdictional questions.

Thompson *vs.* Whittman, 18 Wall. 457.

In the case of Stewart *vs.* United States (Circuit Court of Appeals, Eighth Court, before Judges Sanborn, Thayer, and Lochren), 119 F. R. 89, which was a *habeas corpus* proceeding, the judgment of the court below discharging the writ of *habeas corpus* and remanding the petitioner was reversed upon the ground that the indictment upon which removal proceedings were founded was "essentially and fundamentally defective." Judge Thayer, in delivering the opinion of the court, at page 93, uses the following language:

> "The consensus of judicial opinion seems to be that when a United States Commissioner, proceeding under section 1014 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 716), commits a prisoner for removal to a foreign district where the prisoner has been indicted, the prisoner may apply to the federal circuit or district court of the district where he has been arrested for a writ of habeas corpus, and if, on the return to such writ, it appears that he was committed for removal solely on the strength of an indictment found in the foreign district, and without other evidence that a crime has been committed, he may be discharged, provided it appears that the indictment, on the strength of which the commitment was obtained, is essentially and fundamentally defective. A federal judge to whom an application for a warrant of removal is

made under section 1014 (U. S. Comp. St. 1901, p. 716), it has been said, 'misconceives his duty, and fails to protect the liberty of the citizen,' if he issues the warrant solely on the strength of an indictment found in the foreign district, which does not substantially state an offense under federal laws. These propositions have been decided frequently at nisi prius, beginning with the case In re Buell, 3 Dill. 116. See, also, In re Terrell, 51 Fed. 213; U. S. *vs.* Brawner, 7 Fed. 86; In re James, 18 Fed. 853; In re Dana, 68 Fed. 886. The practice of issuing a writ of habeas corpus in such cases for the purpose of inquiring into the validity of an indictment on the strength of which a person has been committed to await the issuance of a warrant of removal under section 1014 of the Revised Statutes (U. S. Comp. St., 1901, p. 716) was also sanctioned and approved by the Supreme Court of the United States In re Palliser, 136 U. S. 257, and in Horner *vs.* U. S., 143 U. S. 207.

"In the present case it appears that Stewart, the appellant, was committed for removal solely on the strength of an indictment found in the District Court of the United States for the District of Kansas, third division, without other evidence of his guilt than the allegations contained in the indictment. We proceed to inquire, therefore, whether the indictment was sufficient to justify a warrant of removal. If it was insufficient, the appellant was entitled to be discharged from arrest."

In the case of In re Greene, 52 Fed. Rep. 104, supra, Mr. Justice Jackson, in discharging the petitioner upon a writ of habeas corpus, at page 106 of the report said:

"It admits of no question that it is both the right and duty of this court, upon this application, to consider and determine whether the indictment pending against the petitioner in the district of Massachusetts charges either a criminal offense or one that comes within the jurisdiction of that court,"

and cites in support of his opinion a number of cases in

the circuit and district courts, and also the case of Horner *vs.* United States, 143 U. S. 207, from which he makes the following quotation:

> "The district judge, in exercising his jurisdiction under section 1014, Rev. St., to issue a warrant for the removal of Horner to the southern district of Illinois, had a right to determine whether or not the offense was within the jurisdiction of the District Court of the United States for that district, and that determination was reviewable by *habeas corpus*."

It was contended in the court below that the recent cases of Greene *vs.* Henkel, 183 U. S. 249, and Beavers *vs.* Henkel, 194 U. S. 73, are in conflict with the position here taken. It is respectfully submitted that this question was not before the court in either of those cases. The principal question determined in the Beavers case was whether the indictment should be treated as *prima facie* evidence of probable cause, and whether the defendant had the right to impeach the indictment by showing that the grand jury did not have testimony before it sufficient to justify its action.

In the Greene case the court declined to consider the question of the sufficiency of the indictment, for the reason that the United States in addition to the indictment had offered other evidence tending to show the commission of the offense therein alleged, and both the commissioner and the district judge had found from that evidence probable cause independent of the indictment, which evidence was not before this court. That this court did not determine the question here presented in the Greene case is apparent from the following quotation from the opinion of the court at page 261 of the report:

> "We do not, however, hold that when an indictment charges no offense against the laws of the United States, and the evidence given fails to show any, or if it appear that the offense charged was not committed or triable in the district to which the removal

> is sought, the court would be justified in ordering the removal, and thus subjecting the defendant to the necessity of making such a defense in the court where the indictment was found. In that case there would be no jurisdiction to commit nor any to order the removal of the prisoner."

This would seem to be conclusive of the question.

Judge Lacombe does not consider that the Greene and Beavers cases change the rule upon the point under consideration. After the decision of those cases, Benson, one of the defendants in this indictment, who had been arrested and held in New York for removal to the District of Columbia on the indictment, was discharged from the arrest as unlawful, on the express ground that the indictment did not charge an offense against the United States. In his opinion, delivered in that case, after stating that technical objections to the indictment would not be considered upon *habeas corpus*, Judge Lacombe added:

> "Where, however, even upon a broad, liberal, and inartificial construction of the language of the indictment, it does not appear that any offense against the laws of the United States has been committed, the section (1014) does not apply, and the prisoner should not be held for removal" (Sec. 131 Fed. Rep. 968).

The Removal of the Appellant to the District of Columbia for Trial Would Be in Violation of His Constitutional Right to be Tried in the District Where the Alleged Offense was Committed.

It has been shown that the alleged crime, if any, was complete in the Northern District of California or in the District of Oregon.

The Constitution of the United States, Article III, section 2, clause 3, provides that *"the trial of all crimes except in cases*

of impeachment shall be by jury, and such trials shall be held in the State where such crime shall have been committed," etc.

The Sixth Amendment to the Constitution also provides that—

> *"In all criminal prosecutions the trial shall be by an impartial jury of the State and district wherein the crime shall have been committed, which shall have been previously ascertained by law."*

Mr. Justice Story, in his Commentaries upon the Constitution, volume 3, chapter 28, section 1775, says of this provision of the Constitution:

> "It is observable that the trial of all crimes is not only to be by jury but to be in the State where they are committed. The object of this clause is to secure the party accused from being dragged to a trial in some distant State, away from his friends and witnesses and neighborhood; and thus to be subjected to the verdict of mere strangers, who may feel no common sympathy, or who may even cherish animosities or prejudices against him. Besides this, a trial in a distant State or Territory might subject the party to the most oppressive expenses, or perhaps even to the inability of procuring the proper witnesses to establish his innocence."

This court, by Mr. Justice Brewer, in the case of Beavers *vs.* Henkel, 194 U. S. 83, after speaking of the Constitutional provisions above referred to, says:

> "It may be conceded that no such removal should be summarily and arbitrarily made. There are risks and burdens attending it which ought not to be needlessly cast upon any individual. These may not be serious in a removal from New York to Brooklyn, but might be if the removal was from San Francisco to New York. And statutory provisions must be interpreted in the light of all that may be done under them. We must never forget that in all controversies, civil or criminal, between the Government and an individual, the latter is entitled to reasonable protec-

> tion. Such seems to have been the purpose of Congress in enacting section 1014, Rev. Stat., which requires that the order of removal be issued by the judge of the district in which the defendant is arrested. In other words, the removal is made a judicial rather than a mere ministerial act."

If the two last foregoing quotations had been composed in reference to the case now before the court they could not be more directly applicable to the circumstances thereof.

The appellant resides upon the Pacific coast. All the acts and transactions alleged in the indictment of any materiality upon the question of his guilt or innocence transpired there. All of the witnesses whose testimony would be necessary in his defense reside there. He has been a resident of California for more than twenty years and is well known there. If the Government should proceed against him criminally in that court, he could procure the attendance of his witnesses upon the court and defend himself. It would be oppressive to require him to defend himself in the Supreme Court of the District of Columbia. It is alleged in the petition that it would be necessary, in a defense to this indictment, for the appellant to examine in his behalf something like a hundred witnesses, who live in Oregon and California, and that the procuring of their attendance in the District of Columbia would involve him in an expense of $30,000 or more. It would be a great hardship, and possibly a denial of justice.

As hereinbefore shown, the allegations of the petition in that regard must be taken as true; but even if it were not so, the allegations of the indictment and the facts of which the court will take judicial notice are a corroboration of the statements of the petition in this regard.

The above constitutional provisions were adopted for the very purpose of preventing parties charged with crime from being removed to remote districts of the country for trial.

The doctrine of constructive presence in the locality of

the alleged commission of a crime, when the party was actually not present, was always an odious doctrine in England and also in this country, and the constitutional provisions above mentioned were adopted for the purpose of eliminating it from the administration of criminal justice.

This doctrine underwent a very thorough discussion in Burr's case, 25 Federal Cases, No. 14,693.

See, also, appendix to 4 Cranch's Reports.

Burr was indicted for treason, and the indictment alleged as an overt act the levying of war against the United States on Blennerhasset Island, in the State of Virginia. At the time of the occurrences on Blennerhasset Island, which were charged in the indictment to amount to the levying of war, Burr was hundreds of miles away, in another State. He was indicted in the District Court for the District of Virginia, upon the theory that as the men on Blennerhasset Island were his confederates and co-conspirators, the act of any one or more of them was his act, and thus, by the doctrine of constructive presence, he would be considered as present with them and engaging in their alleged unlawful acts.

That case turned upon that question and was taken from the jury by Chief Justice Marshall on the point that Burr could not be considered as present when he was actually absent.

The doctrine of constructive presence underwent a very thorough examination and discussion in that case by many of the ablest counsel in the country, as well as by Chief Justice Marshall. And it may safely be said that the great Chief Justice and the lawyers engaged in that trial understood and appreciated the principles and spirit of our Constitution as thoroughly and fully as any subsequent members of the profession.

The attempt to indict and try Burr in the District of Virginia was held to be in violation of the provisions of the Constitution; and Chief Justice Marshall's opinion in

sustaining the defense is very thorough and exhaustive. The following excerpts are made therefrom:

> "The place in which a crime is committed is essential to an indictment, were it only to show the jurisdiction of the court. It is also essential for the purpose of enabling the prisoner to make his defense. That at common law an indictment would have been defective which did not mention the place in which the crime was committed, can scarcely be doubted. For this it is sufficient to refer to Hawkins, v. 2, c. 25, sec. 84, and c. 23, sec. 91. This necessity is rendered the stronger by the constitutional provision that the offender 'shall be tried in the State and district wherein the crime shall have been committed,' and by the act of Congress which requires that twelve petty jurors, at least, shall be summoned from the county where the offense was committed.
>
> "A description of the particular manner in which the war was levied seems also essential to enable the accused to make his defense. The law does not expect a man to be prepared to defend every act of his life which may be suddenly and without notice alleged against him. In common justice the particular fact with which he is charged ought to be stated, and stated in such a manner as to afford a reasonable certainty of the nature of the accusation, and the circumstances which will be adduced against him. . . .
>
> "That clause in the Constitution, too, which says that in all criminal prosecutions the accused shall enjoy the right 'to be informed of the nature and cause of the accusation,' is considered as having a direct bearing on this point; it secures to him such information as will enable him to prepare for his defense. It seems, then, to be perfectly clear that it would not be sufficient for an indictment to allege generally that the accused had levied war against the United States. The charge must be more particularly specified by laying what is termed an overt act of levying war. The law relative to an appeal, as cited from Stamford, is strongly corroborative of this opinion. If it be necessary to *specify the charge in*

the indictment, it would seem to follow, irresistibly, that the charge must be proved as laid.

"All the authorities which require an overt act require also that this overt act should be proved. The decision in Vaughan's case is particularly in point. *Might it be otherwise, the charge of an overt act would be a mischief instead of an advantage to the accused. It would lead him from the true cause and nature of the accusation instead of informing him respecting it.*

"But it is contended on the part of the prosecution that, although the accused had never been with the party which assembled at Blennerhassett's Island, and was at the time at a great distance, and in a different State, he was yet legally present, and, therefore, may properly be charged in the indictment as being present in fact. It is, therefore, necessary to inquire whether *in this case the doctrine of constructive presence can apply.* . . .

"If such evidence would support such an indictment *by the fiction that he was legally present*, though really absent, all would ask: To what purpose are those provisions in the Constitution which direct the place of trial and ordain that the accused shall be informed of the nature and cause of the accusation?" . . .

The question before the court in this case is precisely the one in Burr's case. All the acts which the appellant did were done in California. He performed no act in the District of Columbia, nor was he present in the District of Columbia, when any acts charged in the indictment were performed by any one else.

Jurisdiction in the Supreme Court of the District of Columbia to try him is sought to be supported upon the theory that as the conspiracy existed among the defendants mentioned in the indictment, the act of one in the District of Columbia was the act of all in that jurisdiction, and a constituent element of the alleged crime, and conferred jurisdiction upon that court, which is refuted by the foregoing authorities.

Nor is the jurisdiction of the Supreme Court of the District of Columbia, aided by Section 731 of the Revised Statutes of the United States, which provides that:

> "When any offense against the United States is begun in one judicial circuit and completed in another, it shall be deemed to have been committed in either and may be dealt with, inquired of, tried, determined, and punished in either district in the same manner as if it had been actually and wholly committed therein."

This section does not aid the prosecution any for the reasons:

(*a*) Because the crime was not commenced in California or Oregon and completed in the District of Columbia, as has been hereinbefore shown. The alleged crime was complete either on the formation of the alleged conspiracy or, certainly, upon the performance of the first overt act, which was not performed in the District of Columbia; and therefore section 731 does not apply.

Dealey *vs.* United States, supra.

In the Dealey case it was held that it was immaterial whether the overt act was committed within the jurisdiction of the United States, thus negativing the claim that section 731 applies to a conspiracy case where the conspiracy is formed in one district and an overt act performed in another.

Burton *vs.* United States, decided at the present term of this court.

In the Burton case it was held that the receipt of the money was the gravamen of the alleged crime, and that, as he received the money in the District of Columbia, the crime, if any, was committed in this District, and not in Missouri. The record shows in that case that Burton had

some negotiations personally with the company in Missouri, and there made an agreement to perform services. While the court in its opinion says nothing upon that point, it is clear that those acts were not considered as being the commencement of the crime.

Applying that to this case, the alleged conspiracy was unquestionably not formed in the District of Columbia, but in California or Oregon. This court has said, in repeated decisions, that the conspiracy is the offense which is complete without the performance of an overt act. This being so, the offense, if any, charged in the indictment now before the court, upon the principle held in the Burton case, must be considered as having been committed wholly in the districts of Oregon or California, and not commenced there and completed in District of Columbia.

(*b*) Because the said section 731 includes only cases where some of the acts material and essential to the crime occur in one district and some in another.

The section is taken from the act of 7 George IV, chapter 64, section 12, which provides that where a crime—

> "is begun in one county and completed in another, the offender may be tried in any of such counties, as, for example, a wound in one county and death in another."
>
> 12 Cycl. Law and Procedure, pp. 239–240.

None of the alleged acts performed in the District of Columbia were material or essential to the completion of the crime. Nor were they the first overt acts.

(*c*) Because section 731 does not apply to the District of Columbia.

What has been said under the first point of this brief, showing that section 1014 does not apply to the District of Columbia, applies with even greater force to section 731, for the reason that the act of June 22, 1874, mentioned under the first point, does not mention section 731. It necessarily follows that even if it could be held that the alleged crime

was commenced in the Northern District of California and completed in the District of Columbia, neither court would have jurisdiction, as the offense could not be said to have been committed in either jurisdiction.

The learned judge below states in his opinion that the questions of the validity of the indictment and of the jurisdiction of the Supreme Court of the District of Columbia are open for consideration upon habeas corpus. His language upon that point is as follows:

> "I am of opinion, however, that if the indictment does not charge any offense whatever under the laws of the United States (which is the allegation of this petition), it is the duty of the court to determine that question; and to that extent the charge contained in the indictment should be examined. Of course, the authorities hold that it is within the jurisdiction of the court, upon writ of habeas corpus, to determine whether the court that found the indictment and to which the prisoner is about to be removed has jurisdiction of the case. This court is required to review that question, and that upon well-settled grounds of jurisprudence. It is within the province of the court of the State where the accused is arrested to determine whether or not the court to which he is being removed has jurisdiction of the offense charged in the indictment" (Rec. p. 112).

He then adds:

> "I have considered very carefully the question whether or not the District of Columbia has jurisdiction of this case, and I consider the law settled. I am satisfied that it has jurisdiction, and that that claim of the petitioners can not be considered as entitling them to be discharged from arrest" (Rec. p. 112).

The foregoing is all he says upon the question of jurisdiction. By what process of reasoning he reached the conclusion that the Supreme Court of the District of Columbia has jurisdiction and upon what authorities, if any, he relied for that position, we are not told.

THIRD POINT.

The indictment referred to in the petition charges no offense against the United States. That the appellant was entitled to be discharged if the indictment was insufficient we have already abundantly shown.

The Indictment

contains forty-two counts, covering ninety-four pages of the record, from pages 12 to 106, inclusive, and contains much redundant, inartificial, and confusing language.

Judge Lacombe, in his opinion above referred to, in the Benson case, makes a very appropriate criticism.

He says:

> "The pleader has followed the archaic forms of expression commonly used in criminal practice—obscure, involved, tautological, and verbose—a single sentence runs stumbling over several printed pages without a period. The meaning can be discovered only by carefully rewriting the sentence, actually or mentally, so as to conform it to the canons of modern English."
>
> In re Benson, 131 Fed. Rep. 969.

The learned judge who decided this case below also says of it:

> "The indictment is not drawn in language that charges the offense described in the statute in such terms as would be good pleading under ordinary circumstances" (Rec. p. 112).

Following the suggestion of those opinions, the following is a reproduction of the first count of the indictment, leaving out only what seems to be immaterial. The portions underscored are the ones that are most material in the consideration of the question of the validity of the indictment.

Stripped of unnecessary verbiage, it alleges that, on the

24th day of October, 1901, and from thence until the 1st day of February, 1904, Frederick A. Hyde and John A. Benson were engaged, at the city of San Francisco, California, for their own gain, in the business of obtaining from the United States and appropriating the possession and use of and title to public lands of the United States outside of forest reserves in exchange for lands lying within such forest reserves and known as school lands, *which they had obtained from the States of Oregon and California*, in the following manner, to wit: That Henry P. Dimond was, during that time, the hired attorney and agent of said Hyde and Benson in said business; that Joost H. Schneider was their agent and employee for hire; that Woodford D. Harlan and William E. Valk were employees of the United States in the General Land Office, in Washington, D. C., and were paid salaries, with duties pertaining to the disposal of public lands outside of forest reserves in exchange for lands within such forest reserves; that Benjamin F. Allen and Grant I. Taggart were employees of the United States as superintendent and surpervisor, respectively, of forests; that the said Hyde, Benson, Dimond, and Schneider, during said period, on the 30th day of December, 1901, in the District of Columbia, did conspire together and with other persons unknown, "*to defraud the United States out of the possession and use of and the title to large tracts of the public lands*," in lieu of lands included and to be included within the limits of forest reserves in the States of Oregon and California, by obtaining, for the benefit of themselves, from the United States and appropriating such possession, use, and title, in pursuance and by means of a false and fraudulent practice whereby the *said Hyde and Benson were to obtain fraudulently from said States of Oregon and California title to and possession of school lands lying within the limits of such forest reserves, . . . which said school lands were to be so obtained from said States* by filing with the (proper) authorities applications for the purchase of the

same, and assignments of the same and of certificates of purchase thereof, (1) in the name of fictitious persons, and (2) in the names of persons not really desiring, and (3) persons not qualified to purchase the same, . . . and by supporting such applications with forged and fraudulent affidavits, and affidavits false and known to be so by the said Hyde and Benson (setting forth the particulars in which the affidavits would be false and fraudulent); and whereby the said Hyde and Benson were to cause to be *relinquished, assigned, transferred and conveyed*, by means of false and forged relinquishments, assignments, and conveyances to the United States, either directly or indirectly, either through said Hyde or through divers agents and attorneys of said Hyde and Benson, to wit (naming them), the pretended rights of such fictitious persons, respectively, and require and procure such real persons to make relinquishments, assignments, transfers, and conveyances, either directly or indirectly through the said Hyde or through the agents and attorneys of the said Hyde and Benson, to the United States *of the titles to and possession of such school lands* so by the use of the names of such real persons fraudulently to be obtained from the said States, and this in either case in exchange for public lands to be selected, and for titles thereto by patent to be obtained by and on behalf of the said Hyde and Benson *in the names of such fictitious* or real persons, or in the name of said Hyde or his agents, from the public lands of the United States in lieu of such school lands; and whereby the said Hyde and Benson were in like manner to exchange such school lands already, before the said period, *obtained* by them from the said States in the same fraudulent manner, for public lands of the said United States lying outside of forest reserves—they, the said Hyde and Benson, when so as aforesaid *causing to be relinquished, assigned, transferred, and conveyed to the United States the titles to and exchanging the school lands, so by either of said methods aforesaid fraudulently obtained and to be*

obtained from said States, for public lands of the United States, well knowing such titles to such school lands to be as they would be, false, fraudulent, fictitious, and worthless, and the possession acquired thereunder unlawful, and intending thereby and by afterwards selling and disposing of such public lands to the general public to defraud the United States out of the possession and use of and title to the public lands so to be selected in lieu of such school lands; and whereby the said Hyde and Benson were, during the said period, to induce and procure the said Harlan and Volk, by paying them money, corruptly to furnish said Hyde and Benson information concerning the status in the Land Office of all matters pertaining to their said business, and especially to their selections of public lands based upon the false, fraudulent, fictitious, void, and worthless titles to lands obtained by them from said States, and to expedite, contrary to their duty as such employees of the United States, matters pertaining to said business, by securing the approval thereof in advance of the time when, in due course, they would be approved by the proper officers, and to induce and procure them to corruptly furnish said Hyde and Benson information concerning any discovery or investigation of the said fraudulent practice to the end that said Hyde and Benson might be enabled to defeat the object of such investigation; and whereby the said Hyde and Benson were to induce and procure and take advantage of the fact that they had before said period induced and procured, by the payment of money to them, the said Allen and Taggart, while forest superintendent and forest supervisor, respectively, contrary to their official duty, to recommend and report to the proper officials of the Interior Department the inclusion of such lands in forest reserves as might be suggested by said Hyde and Benson to best effect the object of such conspiracy; and whereby said Dimond as agent, employee, and attorney of said Hyde and Benson, for valuable consideration, was to

aid and assist said Hyde and Benson in their said business, by appearing in their behalf, before the proper officers of the Interior and Land Department at Washington, and urge speedy action upon matters there pending in relation to said business, well knowing the fraudulent character of said business and that his acts were to be done in pursuance of and to effect the object of said conspiracy; and whereby the said Schneider, for a valuable consideration, was to aid the said Hyde and Benson in various ways, amongst them by negotiating with and procuring persons willing to sell and allow the use of their names for the purpose of making application for such school lands and procuring false affidavits to be used for such purpose, and—

> "*by forging and procuring to be forged, the necessary documents for securing the titles to such lands from the said States in the names of fictitious persons . . . and conveying the same to the United States.*"

The overt act, alleged in the first count, is to the effect that in pursuance of the conspiracy and to effect the object thereof and to defraud the United States out of the possession and use of and title to certain tracts of lands therein particularly described, then lately before in pursuance of said conspiracy selected, in the name of C. W. Clarke, for the benefit of Hyde and Benson, in lieu of certain school lands therein particularly described, *before then obtained by Hyde and Benson from said States, in pursuance of the same fraudulent practice, and in the manner and by the means aforesaid*, the said Dimond, on the 30th day of December, 1901, at Washington, D. C., unlawfully did present to the Commissioner of the Land Office a certain letter setting it out, which simply refers to the base lands and the lieu lands and notifies the Commissioner of his appearance as attorney for Clarke and requests the usual notice of action, and then follows the allegation that Dimond knew at the time that

the letter pertained to and was presented to effect the object of the conspiracy.

The situation and facts to which the indictment is intended to have reference, aresubstantially as follows:

The Government had granted to the States of California and Oregon large tracts of lands known as school lands. Many of these tracts consisted of forests, which the Government subsequently desired to preserve in their natural state and to reacquire the title thereto for that purpose, and by the twenty-fourth section of an act entitled "An act to repeal timber-culture laws, and for other purposes," approved March 3, 1891, it was provided:

> "Sec. 24. That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof" (26 Stats at Large, p. 1103).

Subsequently, by an act approved June 4, 1897 (30 Stat. 36), Congress provided for the relinquishment to the United States by parties holding titles thereto of any tracts of land embraced in forest reservations established by the proclamation of the President in the following language:

> "That in cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the Government, and may select in lieu thereof a tract of vacant land open to settlement, not exceeding in area the tract covered by his claim or patent, and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected. Provided, further, that in cases of unperfected claims the requirements of the law respecting settlement, resi-

> dence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims."

By a subsequent act, approved June 6, 1900 (31 Stat. 614), it is declared—

> "that all selections of land made in lieu of a tract covered by an unperfected bona fide claim, or by a patent included within a public forest reservation, as provided in the act of June fourth, eighteen hundred and ninety-seven, . . . shall be confined to vacant surveyed and non-mineral public lands which are subject to homestead entry, not exceeding in area the tract covered by such claim or patent. Provided that nothing herein contained shall be construed to affect the rights of those who, previous to October first, nineteen hundred, shall have delivered to the United States deed for lands within forest reservations and make application for specific tracts of lands in lieu thereof."

Under these laws the States of California and Oregon could have relinquished title to these lands, and any person who had acquired title thereto from those States could also do the same and obtain therefor public lands of the United States open to entry of equal area not in forest reserves. As lands lying within the boundaries of forest reserves were likely to be and remain of less value than lands not so situated, the laws offered an inducement to parties to make the exchange. The arrangement was one for the mutual advantage of the United States and the private owners of lands within the forest reserves. It was considered to be in the public interests for the Government to extinguish the ownership of all parties other than itself to lands within the forest reserves. Lands which had been granted to the States of Oregon and California by the United States were for school purposes, and it was the policy of those States to dispose of them for the purpose of raising school

funds. Each of the States passed laws by which any person who was a citizen of the United States and of said State, or who had declared his intention to become such, might acquire from the respective States 320 acres of such lands in Oregon and 640 acres in California. They were required to make application to the land officers of said States and to make the necessary affidavits to show that they were qualified to purchase and that they were purchasing them for their own use and had not sold or agreed to sell the same. There is nothing in the laws of those States, however, prohibiting the parties after acquiring a certificate of purchase of said lands from the States to sell and convey the same, or assign the certificate of purchase. On the contrary, such conveyance or assignment is expressly authorized. It therefore appears that any person by purchasing from the patentees of the State might acquire title to an unlimited quantity of said lands. Nor do we understand that it is contended in this case that he might not properly do so and then exchange the lands so acquired with the United States, provided he had acquired valid title from the States and conveyed the same to the United States in lieu of the lands to be granted by the Government.

The scheme of the indictment is to allege a conspiracy on the part of the defendants to obtain title to the lands in violation of the policy of the States of California and Oregon by having persons who were not qualified to purchase make applications, and persons who did not desire to purchase for their own use, and persons who had already before making the application contracted to sell the lands they might obtain to Hyde or Benson, and by supporting those applications by false affidavits and forged assignments of the certificates of purchase, and after acquiring the titles from the States in that way to exchange the lands so acquired with the United States for other lands open to entry not within forest reserves.

Our contention is that the allegations of the indictment,

while they have a tendency to show, and if true would show, that the defendants may have entered into a conspiracy against the policy of the laws of California and Oregon, fails utterly to show that the United States could in any way be defrauded. For, if the defendants by their acts set out in the indictment acquired, as we contend the allegations of the indictment show they did acquire, the title of the State to those lands, upon conveyances of said lands to the United States the latter got good title as against all the world, and therefore could not be defrauded. In this connection it may be said that the allegations of the indictment do not show that even the States of California and Oregon were defrauded out of anything of money value. The laws of those States fix the price for which lands should be sold, and it is nowhere alleged in the indictment that the money was not paid for every acre of land which the defendants are charged to have acquired from either of those States, or that it was the purpose of the alleged conspiracy to obtain any without paying therefor. If there was any fraud practiced upon those States it was a fraud against the policy of the laws which enabled persons not qualified within the law to become purchasers from the State. The laws of the States of Oregon and California relating to the purchase of its public lands so far as material to this inquiry are printed as Appendix No. 4 to this brief.

It was contended in the court below that the language of the indictment might and should be construed to set forth a scheme whereby the defendants in order to defraud the United States out of its public lands formed a conspiracy to obtain patents from the States in the names of fictitious persons, and then to cause conveyances to be made to the United States in the names of those fictitious persons, whereby no title would pass from the State and obtain in lieu of such fictitious and void titles good titles to lands of the United States.

It is submitted, however, that the indictment can not

properly be construed to set forth such a scheme or conspiracy.

It is alleged in the first count of the indictment—

> "That on the 24th day of October, 1901, and from thence until the 1st day of February, 1904, Frederick A. Hyde and John A. Benson were engaged, at the city of San Francisco, in the State of California, for their own profit, gain, use, and benefit, respectively, in the business of obtaining from the said United States and appropriating, in the manner hereinafter set forth, the posession and use of and title to public lands of the United States outside of forest reserves established under the laws of the United States, *in exchange for and in lieu of lands lying* within such forest reserves and known as school lands, by them, *the said Frederick A. Hyde and John A. Benson, obtained from the States of California and Oregon in the manner hereinafter set forth*" (Rec. p. 12).

Here is an allegation that Hyde and Benson obtained the lands from the States of California and Oregon which they intended to exchange for lands of the United States. It can have no other meaning than that they obtained the titles to those lands, however fraudulently the indictment may indicate that that was done.

After stating the connection that the other defendants had with that business and the relation that Harlan, Valk, Allen, and Taggart sustained to the United States, it is alleged that the defendants—

> "during the period aforesaid, to wit, on the 30th day of December, 1901, at Washington, aforesaid, in the District of Columbia, unlawfully did conspire, combine, confederate, and agree together, and with divers other persons to the said grand jurors unknown, knowingly, wickedly, and corruptly, to defraud the said United States out of the possession and use of, and the title to divers large tracts of the public lands of the United States open and to be opened to selection, under the laws of the said United States in

> that behalf, in lieu of lands included and to be included within the limits of forest reserves, established and to be established, as aforesaid, in the said States of California and Oregon, by obtaining for the profit, gain, use, and benefit of themselves, as in this count of this indictment hereafter set forth, from the said United States, and appropriating such possession, use, and title in pursuance and by means of a false and fraudulent practice whereby the said Frederick A. Hyde and John A. Benson *were to obtain fraudulently from the said States of California and Oregon title to and possession of school lands lying within the limits of such forest reserves*" (*Rec. p. 13*), *and then exchanging such lands for lands of the United States. It will be perceived that the pleader here alleges as part of the alleged conspiracy that the defendants were "to obtain fraudulently from said States title to and possession of" the school lands in question.*

Further along in the indictment in alleging the part that defendant Schneider was to perform in the alleged conspiracy, it is alleged that he was "to aid and assist" the said Hyde and Benson amongst other things "by forging and procuring to be forged the *necessary documents for securing the titles to such lands from the said States in the names of fictitious persons and for relinquishing, transferring, and conveying the same to the said United States as aforesaid*" (Rec. p. 17). This quotation from the indictment shows that the pleader, although he used the term "fictitious persons," understood and intended to allege that the defendants would obtain the title to the lands from the States, and must have meant by that allegation that the applications would be made in the names of fictitious persons and after the issue of the certificates of purchase would be assigned or transferred in that name to some person to whom the patent would be made and who would take title in that way. No other reasonable meaning can be attached to the allegation.

In the overt act alleged in the first count of the indictment it is charged—

"that, in pursuance of the said unlawful conspiracy . . . and to effect the object of the same . . . and to defraud the said United States out of the possession and use of, and the title to, certain of the tracts of public lands as aforesaid, that is to say (describing them) . . . selected in the name of Crawford W. Clark . . . by and on behalf of the said Frederick A. Hyde and John A. Benson, *in lieu of certain school lands before then obtained, by the said Frederick A. Hyde and John A. Benson, from the said States of Oregon and California, in pursuance of the same fraudulent practice and in the manner and by the means aforesaid*, some then lying within the limits of the Cascade Range Forest Reserve in the State of Oregon," describing them (Rec. p. 18).

Here, again, it will be observed that the pleader alleges that Hyde and Benson had obtained from the States the lands which they offered to exchange with the United States for some of its lands. No other meaning can be attached to this language taken in connection with that heretofore quoted than that they had obtained title, although the allegations may tend to show that they had obtained it in a fraudulent manner from the States.

Although it is alleged in said indictment as part of the means by which the conspiracy was to be executed that—

"said school lands were to be so obtained from the said States by making and filing with the said authorities applications for the purchase of the same, and assignments of the same, and of the certificates of purchase thereof, in the names of fictitious persons, and in the names of persons not really desiring, and not qualified, to purchase the same (the use of which last mentioned names for such purposes the said Frederick A. Hyde and John A. Benson would procure by paying and causing to be paid to such persons respectively small sums of money, and by falsely representing and causing to be represented to some of such persons that they were merely disposing of their respective rights to purchase such school lands)

> and by supporting such applications with forged and fraudulent affidavits . . . and affidavits of fictitious persons," etc. (Rec. p. 13);

and other allegations in relation to fictitious persons and papers referred to in various parts of the indictment, it can not be gathered by any fair intendment that the pleader has or intended to charge a conspiracy to be executed by obtaining void patents in the names of fictitious persons and forged conveyances in the names of such fictitious persons to the United States in exchange for its lands.

This is the view taken of the indictment by Judge Lacombe in his opinion hereinbefore referred to. After analyzing the indictment he says of it upon this point:

> "The particular 'false and fraudulent practice' which is charged as a gravamen of the conspiracy is this. Applications for purchase were to be made and filed in the names of fictitious persons, and in the names of persons not really desiring and not qualified to purchase the same, and of persons who had already assigned to the conspirators, and these applications were in many instances to be supported by false, fraudulent, or fictitious affidavits. The details need not be more particularly rehearsed; suffice it to say, that the school lands thus obtained, by fraudulent practices from the two States, were to be exchanged, under the statutes above quoted for public lands of the United States lying outside of the forest reserves, the said conspirators, in the language of the indictment, 'intending thereby and by afterwards selling and disposing of such public lands and patent titles to the general public to defraud the said United States out of the possession and use of, and of the title to, the public lands so to be selected, obtained and appropriated in lieu of such school lands as aforesaid to the profit, gain, use, and benefit of themselves.'
>
> "Manifestly the entering into such a scheme would be a conspiracy to defraud the States of California and Oregon, but it is difficult to understand

upon what theory it can be held to be a 'conspiracy to commit any offense against the United States or to defraud the United States in any manner.' There is nothing to show that the alleged conspirators ever contemplated offering to the United States Land Office in exchange for 'outside' lands of the United States any 'school' lands for which the State had not granted a patent to the applicant. When patented school lands are taken by the United States, in exchange for other lands which constitute a valuable consideration, the Government acquires a perfect title to such school lands. Authorities need not be cited, since it was conceded on the argument and on the brief that the title obtained by a patentee can not be attacked collaterally for frauds practiced in obtaining it. The United States, therefore, assuming that the alleged conspiracy were consummated would have obtained from the State patentee of school lands a perfect title, acre for acre, in exchange for its own 'vacant surveyed and non-mineral public lands, which are subject to homestead entry.' With the methods by which the patentee acquired his title from the State it had no concern; if State laws were violated and the public policy of the State fraudulently evaded, it may be assumed that the State would punish the offender." (In re Benson, 131 F. R. 970–1).

Judge DeHaven, the district judge for the Northern District of California, who issued the warrant of removal in this case, also took the same view of the indictment in this regard, as shown by the following quotation from his opinion, which is printed as Appendix No. 3 of this brief, page 47:

"It is well settled that upon an application for a warrant of removal under section 1014 of the Revised Statutes, it is the duty of the judge to inquire into the sufficiency of the indictment, where the application for removal is based upon the indictment alone, and if in such case the indictment does not charge an offense, the warrant should be refused. The first question then for consideration at this time is that which relates to the sufficiency of the indict-

ment. Do the facts set forth in the first count show that the defendants entered into a conspiracy to defraud the United States out of the title to any of its public lands? It is claimed by the Government that the indictment should be construed as charging in addition to other matters that the defendants conspired together to obtain from the States of California and Oregon patents for school lands in the names of fictitious persons and then to exchange the apparent title so obtained for lands of the United States, and for the purpose of effecting such exchange were to give to the United States forged conveyances executed in the names of such fictitious patentees, purporting to convey to the United States land covered by such patents, and also deeds executed by apparent grantees of such fictitious persons purporting to convey to the United States other portions of such patented land. If such is the true construction of the indictment, there can be no doubt that it sufficiently charges the defendants with a conspiracy to defraud the United States out of the title to the lands which it might give in exchange for such fictitious titles. A patent issued in the name of a fictitious person conveys no title; it is not simply voidable but absolutely void. Moffatt *vs.* United States, 112 U. S. 24; United States *vs.* Southern Colorado Coal & Town Co., 18 Fed. 273. But I am not satisfied that this contention by the Government as to the construction of the indictment in this respect can be sustained. The most direct and certain allegation in the indictment is that the conspiracy contemplated that the defendants, 'Frederick A. Hyde and John A. Benson, were to obtain fraudulently from the said States of California and Oregon title to and possession of school lands lying within the limits of forest reserves and open to purchase from those States.' The indictment then proceeds to set forth that one of the ways by which such title was to be fraudulently acquired, was for Hyde and Benson to make and file 'with the said authorities applications for the purchase of the same, and assignment of the same, and of the certificate of purchase thereof, in the

names of fictitious persons.' *If this allegation means anything at all, it is that the applications were to be fraudulently made in the names of fictitious persons, and that purported assignments of the certificates of purchase which might be issued thereon should also be filed with the authorities of the State. In that event the patent would issue to the person named as assignee in such fraudulent assignment, and the legal title would also pass to him. There is no direct averment that the defendants were to obtain any patent from either of the States referred to in which a fictitious person should be named as grantee.* The indictment is certainly subject to very severe criticism because of lack of precision and singleness in the statement of facts; but I think upon consideration of all of its allegations, the first count may be construed as charging in substance that the defendants entered into a conspiracy to obtain from the United States title to public lands situate outside of forest reservations in exchange for school lands within forest reservations, the title to which was to be fraudulently obtained from California and Oregon by the defendants Hyde and Benson, upon applications filed in the names of fictitious persons, and upon purported assignments of the rights of such fictitious persons to patents, and in the names of persons whose applications to purchase were to be supported by the false and fraudulent affidavits referred to in the indictment. It will thus be seen that the object of the alleged conspiracy was to enable the defendants Hyde and Benson to obtain from the United States a perfect title to certain of its public lands in exchange for school lands situate in forest reservations, to which they held only the naked legal title, the equitable title thereto being either in the State of California or Oregon. Upon the part of the defendants it is insisted that effecting such exchange of land in the manner and under the circumstances set forth in the indictment would not be a fraud upon the United States, for the reason that in such transaction the Government would be an innocent purchaser and therefore receive a perfect title to the lands conveyed to it" (Appendix No. 3). pp. 21-22.

Judge Morrow also gave the indictment the same construction upon the point under consideration. After quoting from the first count of the indictment the charge of conspiracy and the means by which it was to be accomplished (Rec. pp. 113–114), he sums up in the following paragraph the meaning of the language of the indictment:

> "This charge, reduced to a simple term, is, that the accused conspired together to obtain from the United States under the Forest Reserve Act patents to lands belonging to the United States in exchange for and in lieu of school lands lying within the limits of such forest reserve, the title to which the accused had obtained or were to obtain fraudulently from the State by means of applications for the purchase of the same in the names of fictitious persons" (Rec. p. 115).

In other words, as Judge Morrow has construed the indictment, it alleges that the applications were made in the names of fictitious persons, but that the patents were issued to real persons because it is alleged that the defendants obtained title to the lands from the States which could have been done in no other way.

It will be seen by reference to the residue of Judge DeHaven's opinion, that although the allegations of the indictment show that the defendants obtained from the States the legal title to the school lands by patent and conveyed that to the United States, still the indictment may be construed as charging a conspiracy to defraud the United States. He seems to base this opinion upon the supposition that while the legal title passed out of the States and into the United States that it left the equitable title in the States. This is not a sound conclusion. The patent issued by the State conveyed the absolute fee simple title. Assuming that it was obtained by fraudulent practices, the State upon discovery thereof would have the option by a direct proceeding for that purpose to have the patent cancelled for

that reason as against the original grantee or any one taking title from him with notice of the fraud. It can not be said, however, that the State, while the patent is outstanding, has an equitable title to the land. It has no title to or interest in the land whatever. Its only right is an option to avoid the patent for fraud upon discovery thereof if the lands shall then be in the hands of any one but an innocent purchaser for value without notice, which it might or might not decide to exercise. That the United States did and would get good title by conveyances from the patentees from the States can not be questioned under the allegations of the indictment. There is no allegation that the United States authorities were to be notified, or were in any way to have knowledge of the alleged fraudulent practices of the defendants in obtaining the titles from the States. Of course if they were to have notice of what they considered to be a fraud they would not take the title, and therefore could not be defrauded. If they had no notice they would get an absolute title good against the States.

It is not only the settled doctrine of this court, but also of the Supreme Court of California that a patent granting public lands, although procured by irregularities or fraud, can not be questioned collaterally, but only by a direct proceeding on behalf of the Government to avoid the patent because of the fraud or irregularities, and that such a proceeding can not be maintained against any party who stands in the position of a purchaser for value without notice.

The following cases are referred to upon this point:

O'Connor *vs.* Frasher, 56 Cal. 499, 501.
Doll *vs.* Meador, 16 Cal. 295, 325.
Thomas *vs.* Lawlor, 53 Cal. 405, 406.
Gale *vs.* Best, 78 Cal. 235, 237.

Turner *vs.* Donnelly, 70 Cal. 597, 604.
Moore *vs.* Wilkinson, 13 Cal. 478, 488.
Yount *vs.* Howell, 14 Cal. 465, 470.
Miller *vs.* Dale, *44 Cal. 562, 577, 578.*
Kentfield *vs.* Hayes, 57 Cal. 409, 410.
Plummer *vs.* Brown, 70 Cal. 544, 545, 546.
Chapman *vs.* Quinn, 56 Cal. 278.
Irvine *vs.* Tarbat, 105 Cal. 242, 243.
Dreyfus *vs.* Badger, 108 Cal. 58, 64.
Standard Quick Silver Co. *vs.* Habeshaw, 132 Cal. 115, 119.
Phillips *vs.* Carter, 135 Cal. 604, 606.
Saunders *vs.* LaParissina Co., 125 Cal. 159, 165.
Harrington *vs.* Goldsmith, 136 Cal. 169.
Marshall *vs.* Farmers Bank of Fresno, 115 Cal. 330.
Colorado Coal Co. *vs.* United States, 123 U. S. 307.
United States *vs.* California and Oregon Land Company, 49 F. R. 496, 498.
Same case affirmed, 148 U. S. 31.
United States *vs.* Winona, etc., Railroad, 165 U. S. 463, 478.
United States *vs.* Chicago, Milwaukee, and St. Paul R. R. Co., decided in this court at the present term.

In Marshall *vs.* Farmers Bank of Fresno, 115 Cal. 330, it was held that a patent from the State running to the grantee absolutely is the highest evidence of transfer of the State's title, and is also evidence that all the steps prescribed for its issuance have been properly taken, and that the certificate of purchase was surrendered by the person entitled to the patent, and that a purchaser from the patentee is not required to look behind the patent to inquire into the right of the patentee to hold the certificate of purchase or to see whether the register had not erred or been duped

when he made the determination that the patentee was the legal holder of the certificate of purchase.

In Colorado Coal Company *vs.* United States, 123 U. S. 307, in a suit in equity by the United States to cancel patents in the hands of the Colorado Coal Company for the grossest frauds practiced in obtaining the patents, the court said, at page 313:

> "It is fully established by the evidence that there were in fact no actual settlements and improvements on any of the lands, as falsely set out in the affidavits in support of the pre-emption claims, and in the certificates issued thereon. This undoubtedly constituted a fraud upon the United States sufficient in equity as against the parties perpetrating it to justify the cancellation of the patent issued to them. But it is not such a fraud as prevents the passing of the legal title by the patents. It follows that to a bill in equity to cancel the patents upon these grounds alone the defense of a bona fide purchaser for value without notice is perfect."

The same doctrine has been reaffirmed by this court at the present term in the case of the United States *vs.* Railroad Company, supra.

This doctrine is too well settled by the adjudications of this court to justify argument or multiplication of cases thereon, as said by Judge Lacombe in his opinion hereinbefore referred to. He said upon this point:

> "When patented school lands are taken by the United States in exchange for other lands which constitute a valuable consideration, the Government acquires a perfect title to such school lands. Authorities need not be cited, *since it was conceded on the argument and on the brief that the title obtained by a patentee can not be attacked collaterally for frauds practiced in obtaining it.* The United States, therefore, assuming that the alleged conspiracy were consummated, would have obtained from the State patentee of school lands a perfect title, acre for acre, in ex-

> change for its own 'vacant surveyed and non-mineral public lands, which are subject to homestead entry.' With the methods by which the patentee acquired his title from the State it had no concern. If State laws were violated and the public policy of the State fraudulently evaded, it may be assumed that the State would punish the offender."
>
> In re Benson, 131 F. R. 971.

It is to be noted in this connection that the statute itself recognizes that a patent is of itself sufficient to impart verity as to title. It provides for claims of "a tract covered by an unperfected *bona fide* claim or by a patent." The claim if unperfected must be shown to be *bona fide*. The patent is conclusively presumed to be *bona fide*.

Opinions of Judges Morrow and DeHaven.

It is respectfully submitted that the case of the Cosmos Exploration Company *vs.* Gray Eagle Oil Company, 190 U. S. 301, referred to by Judges Morrow and DeHaven in their respective opinions, has no bearing upon the question now under consideration. The only question determined in that case was that the selector who had surrendered or conveyed a good title to the United States to base lands and made selection in the proper local land office of other lands in lieu thereof, to which another party, within the time limit of the law, filed an adverse claim, obtained no such equitable title in the land as would enable him to maintain a suit for an injunction in relation thereto until such time as the Land Office disposed of the contest. It is true that the court says in that case that the action of the selector in conveying the base lands is an assertion on his part that he is the owner in fee simple of the land he proposed to relinquish. But it is not perceived how that principle can affect the present question. Upon our construction of the allegations of the indictment to the effect that the patents from

the State were granted to natural persons, and in this construction all the judges who have considered it concur, they conveyed a good fee simple title, and there was nothing false in the representation that the defendants made in relinquishing these titles. They did and could convey to the United States the absolute fee simple interest in the land, and these patents and titles can not be assailed collaterally.

In Steel *vs.* Smelting Co., 106 U. S. 447, Mr. Justice Field (p. 450), speaking for the court, said :

> "We have so often had occasion to speak of the Land Department, the object of its creation, and the powers it possesses in the alienation by patent of portions of the public lands, that it creates an unpleasant surprise to find that counsel, in discussing the effect to be given to the action of that department, overlooked our decisions on that subject. That department, as we have repeatedly said, was established to supervise various proceedings whereby evidence of a title from the United States to portions of the public domain is obtained, and to see that the different requirements of acts of Congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of a class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceeding for its annulment or limitation. Such has been the uniform language of this court in repeated decisions."

The same rule applies to grants from a State.

Again, the regulations of the Land Department show that the *legal title was what the Government required in exchange for the lands to be conveyed by it* (see section 14 of the Instructions of Land Office Relative to Forest Reserve Lieu Land Selections, Appendix No. 2).

Under such regulations, a trustee holding the naked legal

title could relinquish; a mortgagor, whose mortgage conveyance was unrecorded, could relinquish—any holder of the legal title, free from incumbrances or outstanding equities of record, could make a valid relinquishment. All that the Land Department asked was that the relinquisher should have the legal title, and that the land should be free from incumbrances and taxes. The department requires that the showing should be made of what appears of record **at the time the relinquishment was filed for record.** This is entirely in harmony with the objects of the law. To require more, would tend to defeat the very purposes of the act of June 4, 1897; would delay the process of exchange while the department was scurrying throughout the country investigating shadowy, unasserted, questionable rights and equities not of record. In this connection it may be added, that the proceedings in this case are entirely unsupported by any action by the States, either civil or criminal; that the States whose process and executive machinery are alleged to have been abused, and whose lands are alleged to have been obtained by fraud, remain quiescent in all of their departments. There is nothing to indicate that they contemplate taking the slightest action, or that they assert any claim whatever as against these defendants, although the United States have been publicly proclaiming these alleged frauds for more than a year.

Again, in the case of Steel *vs.* Smelting Company, supra, Mr. Justice Field, quoting from Johnson *vs.* Towsley, 13 Wall. 72–73, said:

> "That when the law has confided to a special tribunal the authority to hear and determine certain matters arising in the course of its duties, the decision of that tribunal, within the scope of its authority, is conclusive upon all others," and that "the action of the Land Office, in issuing a patent for any of the public lands subject to sale by preemption or otherwise, is conclusive on the legal title, must be admitted under the principles above stated, *and in all*

courts and in all forms of judicial proceedings, where this title must control, either by reason of the limited powers of the court, or the essential character of the proceedings, no inquiry can be permitted into the circumstances under which it was obtained" (106 U. S. 451).

In a trial upon this indictment the patents from the States and the relinquishments to the United States would be presented as evidence of both the alleged conspiracy and the performance of overt acts, and then in order to make out that the conspiracy, if consummated, would have defrauded the United States, the Government would be obliged to offer evidence tending to impeach these patents, which is in violation of the well-settled rule of this court that patents so issued can not be assailed in any collateral proceeding; but until they are declared void by a court of competent jurisdiction in a direct proceeding for that purpose, they are binding not only upon the States but upon the United States, and the United States courts in this collateral proceeding would have no jurisdiction or authority to hear evidence to impeach them.

It is a well-settled principle of law that no person can be convicted of a criminal offense in relying upon or attempting to enforce, in any legal way, a judgment in his favor, as long as the judgment is in force and unreversed, although he may have committed a crime in obtaining the judgment.

In issuing a patent for land the officers charged with that duty act in a judicial capacity, and their action in issuing a patent is as conclusive as the judgment of a court. A patent issued by the United States or a State has the legal effect of a judgment. It imports that all proceedings have been properly conducted to obtain the patent. It is in the nature of a judgment in rem (Steel *vs.* Smelting Co., 106 U. S. 451). No criminal prosecution could be maintained against a person in whose favor a judgment has been obtained for

proceeding to use or enforce it, even though the judgment had been obtained by fraud. A criminal proceeding might be maintained for any unlawful act done to procure the judgment, but not for the use of the judgment itself, until the same was set aside. *Here the criminal proceeding is for using certain patents, not to punish for certain acts in procuring the patents.* Having the patents, they are presumed to be valid, and a criminal proceeding can not be maintained wherein the validity of the patents is necessarily in question, in the absence of a judgment of some court of competetent jurisdiction canceling the patent.

If a person by false and fraudulent representations obtains the consent of a defendant to the entry of a judgment in his favor, in an action then pending, and the payment of a sum of money in satisfaction of that judgment, he can not be convicted of obtaining the money by false pretenses.

7 Am. & Eng. Ency. of Law (1st ed.), 713, citing—Commonwealth *vs.* Harkins, 128 Mass. 79.

In the case cited the court held the indictment defective, saying:

> "The facts stated do not constitute the offense of obtaining money by false pretenses. The allegations are that an agreement that judgment should be rendered was obtained by the pretenses used, and that the money was paid by the city in satisfaction of the judgment. It is not alleged that after the judgment was rendered any false pretenses were used to obtain the money due upon it; and, even with proper allegations to that effect, it has been held that no indictment lies against one for obtaining by such means that which is justly due him. There is no legal injury to the party who so pays what in law he is bound to pay (Comm. *vs.* McDuffy, 126 Mass. 467; People *vs.* Thomas, 3 Hill, N. Y. 169; Rex *vs.* Williams, 7 Car. & P. 354). A judgment rendered by a

court of competent jurisdiction is conclusive evidence between the parties that the amount of it is justly due to the judgment creditor. Until the judgment against the defendant was reversed, the city was legally bound to pay it, notwithstanding it may then have had knowledge of the original fraud by which it was obtained, and with or without such knowledge it can not be said that the money paid upon it was in a legal sense obtained by false pretenses, which were used only to procure the consent of the city that the judgment should be rendered."

Undoubtedly the State can indict men for frauds practiced in obtaining a judgment. Thus, if forgery, perjury, subornation of perjury, bribery, or other such offenses are practiced in the obtaining of the judgment, the criminal law is violated, and the State may proceed against the guilty parties to vindicate the wrong done to it, irrespective of the wrongs suffered by the judgment debtor, and even if the judgment has not been set aside. Undoubtedly, also, a conspiracy to obtain a judgment by such illegal and fraudulent means could be punished by the State, even if the judgment is not set aside. But inasmuch as in the case at bar the offense against the United States is not the means used in getting the lands from the State, but is alleged to consist in the supposed conspiracy to exchange lands so obtained for lands of the United States, the gist of the offense is the alleged invalidity of the patents or the judgments of the land departments of the States. Under the foregoing authorities, however, the use of these patents would be no crime, because, until set aside by a proper proceeding instituted by the States, such patents, even if obtained by fraud, are valid. *No case can be found sustaining the proposition that any act done by a party in the enforcement of a judgment fraudulently obtained by him, unreversed, and the enforcement of which is unenjoined, is a criminal offense.*

The weight of authority—in fact, the decisions are prac-

tically unanimous—is that a party can not maintain an action of damages against another for procuring a judgment against him by fraud or issuing execution thereon while the judgment remains valid of record.

As illustrating this rule, see—

Huffer *vs.* Allen, L. R., 2 Exch. 15.
Castrique *vs.* Behrens, 30 L. J. Q. B. 163; s. c., 3 El. & El. 709 (107 E. C. L.).
Engstrom *vs.* Sherburn, 137 Mass. 153.
Dunlop *vs.* Glidden, 31 Me. 435.
Smith *vs.* Abbott, 40 Me. 442.
Lyford *vs.* Demeritt, 32 N. H. 234.
Hillsborough *vs.* Nichols, 46 N. H. 379.
Nicholson *vs.* Nicholson, 113 Ind. 131.
Peck *vs.* Woodbridge (Conn.), 3 Day, 30.
Kimball *vs.* Newport, 47 Vt. 38.
Stackhouse *vs.* Keiger, 25 Weekly Notes (Pa.) 436.

These authorities are in accord with Chief Justice Marshall's decision in Sims *vs.* Slacum, 3 Cranch, 300, and Commonwealth *vs.* Harkins, 128 Mass. 79. Their effect is, that while the judgment stands in full force, unreversed and not set aside or enjoined, the issuance of an execution on it, the collection of money, etc., constitute no civil wrong. Much less would they sustain a criminal prosecution.

Applying them to the case at bar, the conveyance to the United States of the title obtained from the States would not work any civil wrong, could not constitute a fraud, would be a perfectly legal and valid act, and could not be a foundation for criminal proceedings by the United States.

The foregoing authorities establish that even taking the allegations of the indictment to be true, the alleged conspiracy could not result in defrauding the United States.

The following cases hold that where the facts stated in the indictment, if true, might show a conspiracy to defraud or to commit an offense against a State, can not, by a mere allegation to that effect, be converted into a conspiracy to defraud or commit an offense against the United States.

In the case of United States *vs.* Crafton et al., 4th Dillon, 145, the indictment charged a conspiracy under section 5440. It alleged substantially that the defendant Crafton was the paymaster-general of the militia of the State of Missouri; that his son was a clerk in his office; that the other defendants were acting as the agents and attorneys for the collection of a claim and demand alleged to be due the members of a certain company of enrolled Missouri militia, growing out of their alleged services in the war for the suppression of the rebellion; that for the purpose of defrauding the United States out of money alleged to be due for such services the defendants conspired to obtain the payment thereof out of the Treasury of the United States; that to effect the object of the conspiracy three of the defendants made a false and fictitious muster and pay roll of said company and presented it to Crafton as paymaster-general, who fraudulently approved it knowing that it was fraudulent; that the said muster and pay roll was forwarded by the defendants and filed in the office of the third auditor of the Treasury for auditing and payment; that the defendants employed persons to secure the passage of a bill which had been introduced into the Senate of the United States for the payment of said fraudulent claims. Judge Dillon, in holding that the indictment did not charge a conspiracy to defraud the United States, at pages 146 and 147 of the report, used the following language:

> "The nature of the acts charged against the defendants in the indictment are more fully seen by reference to the act of the legislature of Missouri,

approved March 19, 1874, entitled 'An act to audit and adjust the war debt of the State.' (Laws 1874, p. 102, sec. 10, et seq.) The claims 'of officers and soldiers of the enrolled Missouri militia' were primarily and, until assumed by Congress, exclusively, against the State, and not against the General Government. The latter has never assumed their payment. If, at the time that the acts set forth in the indictment were done, the General Government had provided for the payment of such claims out of its own Treasury, undoubtedly those acts, fraudulent in their nature and object, would have been criminally punishable. It is just at this point that the case stated in the indictment is vulnerable. Under the recognized rules of criminal pleading, it is not sufficient to allege generally a conspiracy to defraud; but the nature of the fraud, and, to the required extent, the manner in which, or the means by which it was to be effected, must be averred (United States *vs.* Cruikshank, 92 U. S. 542, 558). In the case at bar this has been attempted by the pleader, but the difficulty is that, it appears from the averments, the alleged conspiracy to defraud the United States was, under the existing legislation of Congress, legally impossible of execution. The fraudulent muster and pay roll was transmitted to the third auditor to be filed, to await the passage of an act of Congress which should provide for the payment of the fraudulent claims contained therein. It was not filed as an existing claim against the United States; on the contrary, the debt to the persons named in the roll was the debt of the State, and would remain such unless Congress should assume it. It could not be known that such assumption would ever be made, or, if made, that the said rolls would have any legal significance or value."

In the case of Pettibone *v.* United States, 148 U. S. 197, there was an indictment against the plaintiffs in error under section 5440 charging them with a conspiracy to commit an offense against the United States, to wit, to obstruct or

impede the due administration of justice in the United States Circuit Court for the District of Idaho in violation of section 5399 of the Revised Statutes. The indictment alleged that in a suit in equity in which the Bunker Hill and Sullivan Mining Company was complainant and the Miners' Union of Wardner and others were defendants, a writ of injunction was issued directed to the plaintiffs in error and others, enjoining them from in any manner interfering with the complainant in any of its work in and upon or about its said mining claims, and from attempting to prevent, by any force or intimidation, any employee of said complainant from proceeding to work for said complainant in a peaceful, quiet, and lawful manner, and then charged that the defendants conspired to intimidate by force and threats of violence the said employees. Motions to quash and demurrers were overruled and verdict and judgment against the plaintiffs in error were entered. In reversing this judgment and sustaining the demurrers this court, by Mr. Chief Justice Fuller, said (p. 203):

> "This indictment does not in terms aver that it was the purpose of the conspiracy to violate the injunction referred to, or to impede or obstruct the due administration of justice in the circuit court; but it states, as a legal conclusion from the previous allegations, that the defendants conspired so as to obstruct and impede. It had previously averred that the defendants conspired by intimidation to compel the officers of the mining company to discharge their employees, and the employees to leave the service of the company, a conspiracy which was not an offense against the United States, though it was against the State (Rev. Stats. Idaho, sec. 6541). The injunction was also set out, and it was alleged that the defendants did intimidate and compel the employees to abandon work; but the indictment nowhere made the direct charge that the purpose of the conspiracy was to violate the injunction, or to interefere with proceedings of the circuit court.

> "*The combination to commit an offense against the United States was averred to consist in a conspiracy against the State, and the completed act to have been in pursuance of such conspiracy;* but the pleader carefully avoided the direct averment that the purpose of the confederation was the interruption of the course of justice in the United States court."

It was insisted on behalf of the defendants in error in the case last cited that although there was no direct allegation in the indictment of an intent to impede justice in the United States court that the acts tended to so impede, and that as there was an intent to violate the State law an intent should be inferred from that to violate the United States law. Responding to that argument, the Chief Justice further said (p. 207):

> "It is insisted, however, that the evil intent is to be found, not in the intent to violate the United States statute, but in the intent to commit an unlawful act, in the doing of which justice was in fact obstructed; and that, therefore, the intent to proceed in the obstruction of justice must be supplied by a fiction of law. But the specific intent to violate the statute must exist to justify a conviction, and this being so, the doctrine that there may be a transfer of intent in regard to crimes flowing from general malevolence has no applicability (1 Bish. Cr. Law, sec. 335). It is true that if the act in question is a natural and probable consequence of an intended wrongful act, then the unintended wrong may derive its character from the wrong that was intended; but if the unintended wrong was not a natural and probable consequence of the intended wrongful act, then this artificial character can not be ascribed to it as a basis of guilty intent. The element is wanting through which such quality might be imparted."

We insist that there are no allegations in the indictment in the case at bar from which any inference could be drawn that the defendants intended to defraud the United States

in any manner whatever. On the contrary, it shows that they intended to and did, so far as they made or caused to be made, conveyances to the United States, relinquish to them good and valid titles in such way that they could not be defrauded. If any intent could be inferred from the allegations of the indictment it would be an intent to defraud the States of California and Oregon. As an intent to defraud the United States is a necessary element of the crime, and such intent does not appear from the indictment, it is demurrable also on that ground.

The allegations of the indictment are uncertain, inconsistent, insensible, and repugnant, and insufficient to inform the appellant of the nature and cause of the accusation against him.

The rule of criminal pleading recognized and enforced by this court is stated in the case of the United States *vs.* Cruikshank, 92 U. S. 542. The indictment in that case was under the Enforcement Act, and charged the defendants with a conspiracy to hinder and prejudice certain persons in the free exercise and enjoyment of the rights, privileges, immunities, and protection granted and secured to them respectively as citizens of the United States. The court held the indictment insufficient because of its failure to specify the particular rights and immunities to which the conspiracy related, and arrested the judgment.

The court said, at page 557:

> "In criminal cases prosecuted under the laws of the United States the accused has the constitutional right 'to be informed of the nature and cause of the accusation' (Amend. VI). In the United States *vs.* Mills, 7th Peters, 142, this was construed to mean that the indictment must set forth the offense with clearness and all necessary certainty to apprise the accused of the crime with which he has been charged."

And again, on page 558, the court says:

> "The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a future prosecution for the same cause; and, second, to inform the court of the facts alleged so that it may decide whether they are sufficient in law to support a conviction if one should be had. . . . It is a crime to steal goods and chattels; but an indictment would be bad that did not specify with some degree of certainty the articles stolen. This is because the accused must be advised of the essential particulars of the charge against him, and the court must be able to decide whether the property taken was such as was the subject of larceny."

In the case of United States *vs.* Hess, 124 U. S. 483, the court states the rule in substantially the same way.

It is submitted that the indictment under consideration does not comply with these rules.

The indictment charges that the defendants entered into a conspiracy—

> *"to defraud the said United States out of the possession and use of, and the title to divers large tracts of the public lands of the United States, open, and to be open, to selection under the laws of the said United States in that behalf."*

There is no specification or description whatever in the charge of conspiracy as to the lands out of which the defendants are alleged to have conspired to defraud the Government. Each count of the indictment charges the conspiracy in the same language. It is true that in the overt act alleged in each of the counts the particular lands sought to be obtained by the defendants from the Government are definitely described, but resort can not be had to the allegations in an overt act to help out defective allegations of the

conspiracy. The conspiracy is the offense and the overt act is no part of it.

In the case of the United States *vs.* Milner, 36 F. R. 890, which was an indictment charging a conspiracy with intent to defraud the United States by obtaining the dismissal or discontinuance of certain suits which by law might be brought by the United States, it was held that the indictment did not sufficiently charge a conspiracy to defraud, because it was nowhere alleged that the lands involved in the suits belonged to the United States. It was argued that inasmuch as one of the overt acts charged the bribery of a Government officer, that the indictment might be construed as a conspiracy to commit an offense against the United States, but the court held that the overt act could not be considered in aid of the allegation of the conspiracy, and sustained a demurrer to the indictment.

In the case of United States *vs.* Britton, 108 U. S. 199, this court said, upon that point:

> "It follows, as a rule of criminal pleading, that in an indictment for conspiracy under section 5340, the conspiracy must be sufficiently charged, and that it can not be aided by the averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy." Citing authorities.

The same doctrine is reiterated in the case of Dealy *vs.* United States, 152 U. S. 547.

There are several cases in the Federal Reports of indictments against persons for conspiring to defraud the United States out of lands, but none has been found where, as in the present indictment, the charge of the conspiracy does not furnish some reasonable identification and description of the lands.

In the case of Dealy *vs.* United States, *supra*, the lands were described as situated in the county of Rolette, State of South Dakota, subject to homestead entry, and this court

held that that was a sufficient description; but there is no intimation by the court that an indictment without any description or reference to the particular lands intended would be good.

In Gantt *vs.* United States, 108 Fed. Rep. 61 (Circuit Court of Appeals, Fifth Circuit), the indictment described the land with great certainty.

In Wright *vs.* United States, 108 Fed. Rep. 805, the lands were described as situated in a certain parish in Louisiana.

Haynes *vs.* United States, 101 Fed. Rep. 817, was an indictment under section 5508 of the Revised Statutes of the United States, charging a conspiracy to prevent a person from entering upon a tract of public land, and the indictment was held bad upon the ground that the land which the person was to be prevented from entering was not described.

In the cases of the United States *vs.* Reichert and others, and United States *vs.* Glover and others, 32 Fed. Rep. 142, the indictment was for a conspiracy to defraud the United States by the means of having false and fictitious surveys of lands made and bills therefor approved by the Surveyor-General of the United States, and thereby obtaining money from the United States without rendering services therefor. The indictments were held insufficient and demurrer was sustained thereto upon two grounds: First, that the indictment did not allege that the Surveyor-General had authority to approve the accounts, and therefore it did not appear that the United States could be defrauded; and, secondly, that the lands concerning which it was alleged fictitious surveys should be presented, were not sufficiently described.

In that case the lands were described by initial letters of localities and points of compass. Mr. Justice Field, in delivering the opinion of the court on a motion for a rehearing of the cases, on page 147 of the report, said:

> "An indictment is to be read to the accused unless the reading is waived. The language should there-

> fore be so plain that one of ordinary intelligence can understand its meaning. For that purpose common words are to be used as descriptive of the matter. Abbreviations of words employed by men of science, or indeed words, will not answer without full explanation of their meaning in ordinary language. The use of the initials A. D. to indicate the year of *our Lord is an exception, because of its universality.* Arabic figures and Roman letters have also become indicative of numbers as fully as words written out could be. They are of such general use as to be known of all men. They therefore may be employed in indictments. But the initials here have reference to the public lands, as marked on the public surveys; they are signs used in a particular department of public business and are not matters of general and universal knowledge by all speakers of the English language. The same objection applies to the initials S. B. M., supposed to denote San Bernardino Meridian.
>
> "There is no averment except in this way that the land alleged to have been surveyed lies in the State of California."

If that general description by abbreviations is not sufficient it necessarily follows that no description whatever is for a stronger reason insufficient.

The allegation is not sufficiently certain to inform the defendants what case they must prepare to meet at the trial. Conspiracies are rarely attempted to be proved by direct evidence, but generally by circumstantial evidence of acts relating to the subject-matter of the conspiracy from which it is to be inferred by the jury. This indictment gives the defendants no notice whatever of the lands to which the evidence of the Government, to be given at the trial, would relate, and is therefore defective according to the rule stated by this court in the Cruikshank case, "because the accused must be advised of the essential particulars of the charge against him."

The indictment is also defectively uncertain in its allega-

tions as to the means to be used to effectuate the alleged conspiracy. The allegation of the indictment in that regard is:

> "Which said school lands were to be so obtained from the said States by making and filing with the said authorities applications for the purchase of the same, and assignments of the same and of the certificates of purchase thereof in the names of fictitious persons, and in the names of persons not really desiring and not qualified to purchase the same."

Here is an allegation that the application to the land officers of the State for the purchase of this property was to be made in the names of three classes of persons: First, in the names of fictitious persons; second, in the names of persons not really desiring to purchase; and third, in the names of persons not qualified to purchase. Nor is the name used to represent any fictitious person given, nor is the name of any real person which was used, who was not qualified to purchase, or who did not desire to purchase.

It is submitted that in order to make a valid indictment under such circumstances it should be set forth in separate counts, not only what class of person was to be used to procure a particular tract of land, but the name used should also be given in the indictment. That this is necessary in order to give the defendants notice of what they must meet at the trial, is too apparent to admit of argument. And attention is called to the fact that even if that defect could be supplied by an allegation in an overt act, the allegations of the overt acts in the indictment upon this point are quite as general as they are in the charge of conspiracy.

In the case of the United States *vs.* Simmons, 96 U. S. 360, the second count of the indictment charged that the defendant did knowingly and unlawfully cause and procure to be used a still, boiler, and other vessel, for the purpose of distilling, within the intent and meaning of the internal revenue laws of the United States, in a certain building and

on certain premises where vinegar was manufactured and produced. In holding this count bad, on a motion in arrest of judgment, this court, speaking by Mr. Justice Harlan, 362, said:

> "Where the offense is purely statutory, having no relation to the common law, it is, 'as a general rule, sufficient in the indictment to charge the defendant with acts coming fully within the statutory description, in the substantial words of the statute, without any further expansion of the matter.' 1 Bishop, Crim. Proc., sec. 611, and authorities there cited. But to this general rule there is the qualification, fundamental in the law of criminal procedure, that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, to the end that he may prepare his defense, and plead the judgment as a bar to any subsequent prosecution for the same offense. An indictment not so framed is defective, although it may follow the language of the statute.
>
> "Tested by these rules, the second count is insufficient. Since the defendant was not charged with using the still, boiler, and other vessels himself, but only with causing and procuring some one else to use them, *the name of that person should have been given.* It was neither impracticable nor unreasonably difficult to have done so. If the name of such person was unknown to the grand jurors, that fact should have been stated in the indictment."

Attention is here called to the great uncertainty of the indictment in this regard. It is alleged that some of the applications to the States for patents were in the names of fictitious persons, and some in the names of real persons, and these real persons are divided into two classes by the allegations of the indictment, to wit: 1st. Those not qualified to purchase; and 2d. Those not desiring to purchase. It is not alleged in the indictment that these applications were made in the names of the defendants, and yet they are not furnished with a single name. We submit that under

this authority the names used in making these applications should have been given in the indictment, and it should have been stated whether they were fictitious names or names of real persons, and if real persons, whether they belong to the one class or the other. It appears from the allegations of the indictment, and the petition, that these names are numerous. Under these vague and uncertain allegations it would be utterly impossible for the defendants to prepare their defense.

Again, the allegations of the indictment are inconsistent, insensible, and repugnant.

It is alleged in the first count of the indictment—

> "That on the 24th day of October, in the year of our Lord 1901, and from thence until the first day of February, in the year of our Lord 1904, Frederick A. Hyde and John A. Benson were engaged at the city of San Francisco, in the State of California, for their own private gain, use and benefit, respectively, in the business of obtaining from the said United States and appropriating . . . the possession, use of, and title to public lands of the United States," etc. (Rec., p. 12).

The case of United States *vs.* Pope, 27 Fed. Cases, case No. 16,069, was a proceeding like the present, to remove a defendant from the District of Massachusetts to Louisiana for trial, upon an indictment for conspiracy found in the United States District Court for Louisiana. The indictment was for a conspiracy to defraud the United States by fraudulently obtaining a judgment against it in the Court of Claims.

In holding the indictment repugnant, and declining the warrant of removal, Judge Lowell said:

> "Briefly stated, it (the indictment) charges the defendants with conspiring, June 10, 1874, to recover a judgment which was entered May 18, 1874. . . . However this fact may be, the allegation

> of the date of the conspiracy involved the indictment in contradictions which, if they are errors, must be corrected by evidence, and none is offered. The indictment itself must stand or fall by its own dates; and if they are repugnant or insensible, the pleading is fatally defective. The Commonwealth *vs.* Hitchings, 5 Gray, 482; United States *vs.* Fox, case 15,156."

It is submitted that the conflict and repugnancy in dates in this indictment are as clear and as fatal to the indictment as in the Pope case.

The following authorities fully sustain the proposition that repugnant allegations in an indictment render it void, and liable to demurrer:

> First Bishop's New Criminal Procedure, 281.
> Hawkins' Pleas of the Crown, 25th section, 62.
> Lehman *vs.* United States, 127 Fed. Rep. 45.
> People against Myers, 20 California, 76.
> Vol. 10, Ency. Pl. and Pr., page 532, and note 2.

In the case of Lehman *vs.* United States, *supra*, in an opinion of the United States Circuit Court of Appeals (2d Circuit), it is said (p. 45) that:

> "It is essential that the charge should not be repugnant or inconsistent with itself, for the law will not permit of absurdity or contradiction in legal proceedings (1 Chitty Criminal Law, p. 231). Repugnacy consists in two inconsistent allegations which destroy the effect of each other (10 En. of Law, 565)."

Attention is also called to the opinion of Judge De Haven, where, after speaking of the allegations in relation to fictitious persons, he says:

> "If this allegation means anything at all, it is that," etc. (Appendix to this brief, No. 3)—

clearly showing that the judge was at a loss to ascertain the real meaning of the pleader, and we think that the lan-

guage of this indictment must make the same impression upon any judicial mind.

In the case of Stewart *vs.* United States, 119 Fed. Rep. 89, the Circuit Court of Appeals of the Eighth Circuit reversed the judgment of the court below, which declined to discharge the applicant on a writ of habeas corpus, who was held under a warrant of removal, as in this case. The indictment in that case alleged a scheme to defraud by use of the postoffice establishment of the United States, under section 5480 of the Revised Statutes. The indictment in that case was also very much involved and uncertain in its allegations. The reading of it reminds one of the indictment in this case.

The Circuit Court of Appeals held it to be demurrable, and that the party should not be transferred to a foreign jurisdiction for trial under such an instrument. In disposing of the case, the court, amongst other things, said:

> "It should be further observed, concerning the indictment as a whole, that it is needlessly long and involved, and that it contains many redundant and immaterial allegations, which defects when taken together, render it difficult to construe and almost unintelligible. If it be an offense under section 5480 . . . to use the mails to induce persons to come to a certain place for the purpose of defrauding them by tricks and artifices to be devised after their arrival, then the indictment now under consideration might and should have been made much shorter, more explicit, and more intelligible. We are of opinion that it lacks that certainty of averment which should be found in an indictment or information, and that for this reason, if for no other, it ought to be quashed on motion to that effect. The result is that the order of the district court discharging the writ of habeas corpus is reversed and the cause is remanded to the lower court, with instructions to discharge the appellant."

Every word of that quotation applies with great force to

this indictment. If it is believed that the appellant and others entered into a conspiracy to defraud the United States out of any of its public lands by offering to them void titles of lands in forest surveys in exchange for good titles to their lands, the facts constituting such an attempt could and should have been set forth clearly and explicitly so that the defendants might have known what sort of case they would be called upon to meet at the trial. It is respectfully submitted that this indictment does not comply with the rules of criminal pleading which this court has invariably applied to indictments.

The Counts Subsequent to The First.

All the other counts of the indictment to and including the thirty-fourth are the same as the first count, except that the lands described in the overt acts as selected by the defendants, and those tendered in lieu of them, are different in each count, and except, also, that in some of the counts in addition to the letter of Dimond written to the Commissioner of the Land Office, there are other letters in some of them alleged to have been written by other persons mentioned in the indictment. The conspiracy alleged in the first count is referred to and adopted in each subsequent count of the indictment, so that if our contention be correct that the allegations in the first count show that the defendants procured the title to the State lands and conveyed them to the United States, that argument applies alike to each of the subsequent counts. The counts from thirty-five to forty-two, inclusive, being the remaining counts of the indictment, are exactly like the first thirty-four counts, except as to the overt acts which, in each of the last seven counts, are alleged to have been the payment of money by Benson to Harlan and Valk, the clerks in the Land Office mentioned in the first count of the indictment, for the purpose of effecting the object of the alleged conspiracy by obtaining title to the lands mentioned in the overt acts in the first thirty-four counts.

Other Allegations of the Indictment.

It is also alleged (Rec. pp. 15 and 16) as a part of the alleged fraudulent practice, that Hyde and Benson were to induce Allen and Taggart, forestry officers of the United States, and take advantage of the fact that before the period of the conspiracy they had induced Allen and Taggart to furnish to the defendants all information gathered by them in their official capacity and to allow the defendants to prepare for them divers of their official reports and recommendations concerning the character and condition of public lands in favor of including or not including such lands within forest reserves or excluding the same therefrom, as should be to the interest of the defendants, and to transmit such reports to their superior officers as their own, and that it was a part of said conspiracy—

> "to secure by these and other means too numerous and diverse to be here described, the establishment of forest reserves under the laws of the said United States in such localities as would best effect the object of the said unlawful conspiracy."

No more general or inadequate pleading could be imagined than the foregoing. The allegations are altogether too indefinite to inform the defendants or the court as to the nature of the charge intended to be made under them.

The allegation that the defendants were to take advantage of the fact that they had previously induced these forestry officers to do certain things must of course be disregarded for its indefiniteness and uncertainty. It is nowhere attempted to show in what manner the defendants were to take advantage of the alleged fact or for what purpose.

The allegation that the defendants were to induce the forestry officers to give them all the information gathered by them in their official capacity is open to the same objection. The character of the information is not disclosed or

the use which defendants could or would make of it or that there was any unfair or dishonest use which could be made by them.

The court is left to conjecture what the nature of the official information of a forestry officer might be. The charge probably intended is that the defendants were thus to obtain advance information as to the proposed location of new forest reserves, but there is no allegation from which such an implication can legitimately be drawn. The fact that a Government forestry officer has certain information concerning a given tract of land can not be presumed to forecast the location of a forest reserve to include that tract, and even if defendants were to obtain such advance information of the establishment of forest reserves, it does not appear that it would have the slightest tendency to defraud the United States. The information which the defendants could obtain from forestry officers, might, so far as the indictment shows, be of the most harmless character and might be used by them for perfectly legitimate purposes. The indictment does not allege that the information so to be obtained was to be used by the defendants in any way.

The allegation that the defendants were to prepare some of the official reports and recommendations for these Government employees for transmission to their superiors in favor of including public lands within the forest reserves or excluding them therefrom, and that it was a part of the conspiracy to secure the location of new forest reserves by this and other means, is as vicious and indefinite as the other allegations concerning Allen and Taggart. While such an act would be morally reprehensible, it does not appear that it would tend to defraud the United States. It does not appear who the superior officers of these employees were to whom reports would be sent, or that they possessed any authority to establish forest reserves. It has been repeatedly held that the filing of a false claim against the United

States does not establish a fraud upon the United States unless it is shown that the officer to whom it was transmitted had authority to approve and pay it (United States *vs.* Reichert, 32 Fed. 142), and the allegation under discussion stands upon the same footing.

Even if the location of the forest reserves in a territory most advantageous to the defendants, could be secured by the means here alleged, it is impossible to conceive how the United States would be thereby defrauded. It is not alleged that the tracts so recommended would not be the tracts which could properly and legitimately be included in the forest reserve, or that the reports to be procured by the defendants from these officials were intended to contain any false information or improper recommendations; and finally the allegation is in the alternative that the reports were to be in favor of *including* such lands within the forest reserves or *excluding* the same therefrom. Obviously, the recommendation that certain tracts should not be included in the forest reserves could not tend to deprive the United States of its public land. This alternative allegation is fatal to the entire charge relative to the reports and recommendations of Allen and Taggart.

Furthermore, every forest reserve mentioned in the indictment in which the base lands described in it were situated, was created many years before the earliest date named in the indictment as the beginning of the conspiracy, and all but one prior to the passage of the act of 1897, authorizing the exchange of the lands of private owners in forest reserves for lands of the United States outside of forest reserves, and the latest was established a few months only after the passage of that act.

All base lands described in the indictment were situated in six different forest reserves. These were established by proclamation of the President of which the court will take judicial notice. The dates of their establishment and the

reference to the statutes at large in which they will be found, are as follows:

Cascade Range Forest Reserve, September 28, 1893, 28 Statute at Large, 1240.

Sierra Forest Reserve, February 14, 1893, 27 Statutes at Large, 1059.

San Bernardino Forest Reserve, February 25, 1893, 27 Statutes at Large, 1068.

Stanislaus Forest Reserve, February 22, 1897, 29 Statutes at Large, 898.

San Jacinto, Forest Reserve, February 22, 1897, 29 Statutes at Large, 893.

Pine Mountain & Zaca Lake Reserve, March 22, 1898, 30 Statutes at Large, 1767, 1776.

The fact that all these reserves had been established from three to eight years prior to the earliest date alleged as the date of the conspiracy, conclusively shows that it could not have been a part of the fraudulent practice, as alleged, to effectuate the conspiracy, that the defendent should attempt by various means to secure the location of the forest reserves in sections especially favorable to effect the object of the conspiracy.

In addition to the foregoing it may be stated that the allegations of the indictment to the effect that the defendants were to obtain selections of forest reserves favorable to their scheme, by bribing Allen and Taggart and secretly procuring them to recommend locations selected by Hyde and Benson, are negatived and shown to be impossible by facts of which the court will take judicial knowledge. Soon after the passage of the Forest Reserve Act of 1891, the Commissioner of the Land Office issued a circular letter of instructions to forestry officers, *in which they were instructed to obtain the views of persons living in the vicinity of forest lands, and before making any recommendations as to localities to publish in the newspapers the proposed localitities of such re-*

serves. This circular is published in the 12th Land Decisions at page 329, and is printed as an appendix No. 5 to this brief

Besides, the part which the indictment alleges was taken, or was to be taken, by Schneider, Dimond, Harlan, Valk, and Taggart, in the execution of the conspiracy, constitute a part of the means by which it was to be carried into execution, and adds nothing to the efficacy of that part of the indictment relied upon by the Government to show that the execution of the conspiracy would result in defrauding the United States. If the alleged scheme or conspiracy could not under the other allegations of the indictment result in defrauding the United States, what these particular individuals did or were to do would in no way change the nature or effect of the alleged conspiracy.

It may here be suggested that the act of June 4, 1897, was not passed for the benefit of parties who held lands within the forest reserves, but was in furtherance of a great public policy, to wit, the preservation of forest lands, and it was directly beneficial to that policy that all of these private land holdings should be eliminated by having the title reconveyed to the United States. Under that act the States of California and Oregon had the same right to select that their grantees had, and the more of these lands that were surrendered the better it was for the Government. The States could also select other lands under act of February 28, 1891 (26 Stats. 796). In pursuance of this policy the land grant railroads surrendered hundreds of thousands of acres in these forest reserves in lieu of other lands selected by them. At the second session of the fifty-eighth Congress Mr. Mondell, from the Committee on Public Lands, made a report, No. 2233, to accompany H. R. 14,622 upon this subject, and in a tabulated statement of lands surrendered in forest reserves in lieu of other lands selected by railroad companies, or in the process of being surrendered, it appears that such lands amounted at that time to nearly 2,500,000 acres.

As further showing that it was the policy of the Government to extinguish holdings of others than itself within the limits of these forest reserves, reference is made to a letter of instructions from the Secretary of the Interior to the Commissioner of the General Land Office of April 26, 1899 (28th Land Decisions, 328), in response to an inquiry by the Commissioner as to the policy of the department, in which the Secretary says:

> "As to the second question, if by settlement laws you mean such laws as make personal settlement and residence upon the tract sought to be acquired a necessary condition to obtaining title, as in the case of the preemption and homestead laws, the question is answered in the negative. That which may be relinquished is described as 'a tract covered by an unperfected bona fide claim or by a patent,' and is believed to include any tract covered by any unperfected bona fide claim under any of the general laws of the United States, or to which the full legal title has passed out of the Government and beyond the control of the Land Department by any means which is the full legal equivalent of a patent. The thing which was objectionable to the forest reservation policy was the presence within the limits of a forest reservation of lands held and controlled by individual claimants or owners. Whether the claim or ownership was initiated or acquired under the homestead statute, which is a settlement law, or under the timber land purchase act, which is not a settlement law, its presence is equally an obstacle to the attainment of the purpose for which the forest reservation was established. In both cases the reservation of the surrounding lands is equally prejudicial to the interests of the claimant or owner."

These matters are drawn to the attention of the court for the purpose of showing that it was, and is, the policy of the Government to obtain the relinquishment of the title to all lands in the established forest reserves, and that the defend-

ants in the indictment in procuring the titles to these lands in forest reserves and relinquishing them to the United States for other lands were not contravening any policy of the Government.

FOURTH POINT.

At the hearing before the Commissioner the evidence introduced by and on behalf of the petitioner proved that there was no probable cause for believing him to be guilty of the offense charged in the indictment, and the court below should have granted the writs of habeas corpus and certiorari and upon hearing thereof should have discharged the petitioner even though the indictment be valid.

Section 1014 of the Revised Statutes of the United States provides that the proceedings for the removal of a party from one district to another shall be "*agreeably to the usual mode of process against offenders in such State.*"

The several sections of the penal code of California providing for the mode of proceedings in the preliminary examination of persons charged with crime and their discharge upon habeas corpus, where held by the magistrate when no probable cause has been shown, are as follows:

Section 864 of said code provides that:

> "At the examination, the magistrate must first read to the defendant the depositions of the witnesses examined on taking the information. He must also issue subpœnaes subscribed by him, for witnesses within the State, required either by the prosecution or the defense."

Section 865 provides that—

> "The witnesses must be examined in the presence of the defendant, and may be cross-examined in his behalf."

Section 866 provides that—

> "When the examination of witnesses on the part of the people is closed, any witness the defendant may produce must be sworn and examined."

The first part of section 869 provides that—

> "The testimony of each witness in cases of homicide must be reduced to writing, as a deposition, by the magistrate, or under his direction, and in other cases upon the demand of the prosecuting attorney or the defendant or his counsel."

The residue of the section, which is long and need not be reproduced, authorizes the magistrate to appoint a shorthand writer to take the evidence and requires the evidence to be filed with the clerk of the proper court.

It will be seen from the foregoing that the appellant was in the exercise of a right in examining the Government witnesses before the Commissioner. The petition alleges that the testimony given by these witnesses is now on file in the clerk's office of the United States District Court for the Northern District of California, and also that such evidence did not tend to establish probable cause to believe the appellant guilty of the offense charged against him (Rec. page 3), and prays for the writ of certiorari to accompany the writ of habeas corpus to bring the record containing that evidence before the court below, to the end that it might review the question of probable cause.

This is in accordance with the code of California.

Section 1473 of that code provides that:

> "Every person unlawfully imprisoned or restrained of his liberty *under any pretense whatever* may prosecute a writ of habeas corpus to inquire into the cause of such imprisonment or restraint.

Section 1487 of said code provides in what cases the petitioner shall be discharged, and subdivision 7 of that sec-

tion provides that there shall be a discharge *"where a party has been committed on a criminal charge without reasonable or probable cause."*

It was therefore the clear right of the petitioner under the laws of California, which control in this proceeding, to have the writs of habeas corpus and certiorari to the end that the court might see from the evidence that he was detained without probable cause.

In the following cases the Supreme Court of California held that under these statutes it was the right of the prisoner to have the court consider the question of probable cause upon the writ of habeas corpus.

People *vs.* Smith, 1 Cal. 9.
In re Salvator Troia, 64 Cal. 154.
Ex parte Palmer, 86 Cal. 631.
Ex parte Walpole, 85 Cal. 372.

An examination of these cases shows that the court had before it the evidence taken before the examining magistrate, considered it upon the question of probable cause, and remanded or discharged in accordance with the evidence.

In the case of People *vs.* Smith, supra, the court said:

> "It is a general rule, that upon application to bail or discharge upon habeas corpus, the court will look into the depositions, and, without regarding the regularity or irregularity of the commitment, will remand, discharge, or bail the prisoner, according to the circumstances of the case. The court, in such case, pronounces no judgment, whether the facts amount to felony or not, but merely whether enough is charged to justify a detainer of the prisoner, and putting him upon his trial. Even if the commitment be regular, the court will look into the depositions, to see if there be a sufficient ground laid to detain the party in custody, and if there be not, will discharge or bail him. So, on the other hand, if the warrant of commitment be informal, they will not discharge or bail the prisoner, without first looking into the

> depositions, if any be presented, to see whether there is sufficient evidence to detain him, and if the matter appear to be such as would require his detention, or his finding sureties, he will be bailed or committed accordingly, and not discharged."

The same rule prevails in the Federal courts. It is common practice for those courts to bring before them the evidence produced before the committing magistrate upon which the commitment is founded, and where the evidence is reduced to writing in the form of a deposition, whether by the committing magistrate or by other competent authority; this is frequently done by certiorari in aid of habeas corpus.

In re Martin, 5 Blatch. 302:

In that case the question of the right of the court to issue the writ of *certiorari* and bring before it the evidence given before the magistrate and examine it upon the question of probable cause, was denied by the United States, and very much discussed. The application was before Judge Shipman, and after determining that it was the duty of the court upon writ of habeas corpus to inquire into the facts relied upon by the Government to establish probable cause against the defendant, he used the following language in relation to the issue of the writ of certiorari:

> "Now, in order to pass upon the evidence, the court must have the same before it. If it is not brought voluntarily into court, the court must have some power to compel its production. The witnesses are not always within its immediate reach, having given their testimony before the Commissioner, and gone to distant homes. In some cases they are abroad or on the high seas, and the prisoner stands committed on depositions sent home by consuls residing in foreign ports. It is a common practice for courts, in most places where the common law exists, to bring before them the evidence produced before the committing magistrate, and upon which his

> commitment is founded; and, where this evidence is reduced to writing, in the form of depositions, whether by the committing magistrate or by other competent authority, this is frequently done by a certiorari, in aid of a habeas corpus. But, in whatever manner the evidence is brought before the court, the court is not concluded by the finding of the committing magistrate (2 Strange, 911 n; King *vs.* Marks, 3 East, 157; Van Boven's case, 9 Ad. & E., new series, 676; Ex parte Tayloe, 5 Cowen, 39; The People *vs.* Martin, 1 Parker's Criminal Rep., 187). In the case of Ex parte Bollman (4 Cranch, 114), Chief Justice Marshall remarked: 'I understand the clear opinion of the court to be (if I mistake it, my brethren will correct me), that it is unimportant whether the commitment be regular in point of form or not; for this court, having gone into an examination of the evidence upon which the commitment was grounded, will proceed to do that which the court below ought to have done.' "

The case referred to in the above quotation, in the 4th Cranch, was an original proceeding in this court. The petitioners had been committed by the circuit court for the District of Columbia on a charge of treason against the United States upon the testimony of several witnesses, which was on file in that court. The petition prayed for the writ of habeas corpus to produce the bodies of the petitioners and for the writ of certiorari to bring up the record of the commitment and the evidence. Both writs were granted, and upon hearing the prisoners were discharged because of the insufficiency of the evidence to establish probable cause. In delivering the opinion, the court, by Chief Justice Marshall, at page 125, said:

> "The prisoners having been brought before this court on a writ of habeas corpus, and the testimony on which they were committed having been fully examined and attentively considered, the court is now to declare the law upon their case."

The case of Greene *v.* Henkel, 183 U. S. 249, also sustains our contention in this particular. In that case the appellants were arrested in the Southern District of New York, and at a hearing before the Commissioner, after the United States had introduced evidence, offered evidence in their behalf which the Commissioner refused to receive and committed them to await the judge's warrant of removal. Upon application to the judge for that warrant he held that the appellants had the right to introduce the evidence and remanded the case to the Commissioner with directions to receive the evidence (United States *v.* Greene, 100 Fed. Rep. 941).

It may be remarked here that the California statute, in relation to preliminary examinations, is like that of New York, in that it gives to defendants the right to introduce evidence. The Commissioner thereupon received the evidence on behalf of appellants in that case, and upon the whole evidence found probable cause and again committed them, and upon application to the district judge for the warrant of removal he reviewed the evidence taken before the Commissioner and also found that it showed probable cause. Upon that point this court, at page 258 of the report, says:

> "Upon all the evidence taken before the Commissioner he has found that probable cause existed. We think that a fair interpretation of the language used by the district judge in granting the application for the warrant of removal shows beyond question that, from the evidence taken before the Commissioner, the judge was of opinion that there existed probable cause, and that the defendants should therefore be removed for trial before the court in which the indictment was found."

Again, on page 259 the court said:

> "The evidence which was taken before the Commissioner and which was before the district judge

> upon the question of the existence of probable cause was not annexed to the petition and forms no part of the proceeding before the circuit court upon the application for the writ of habeas corpus. Whether that evidence was or was not sufficient for the Commissioner to base his action upon or for the district judge to approve, was not a question before the circuit judge, and is not before this court. We must assume, in the absence of the evidence taken before the Commissioner and approved by the district judge, that their finding of probable cause was sustained by competent evidence, bearing in mind also that on this proceeding the court would not in any event look into the weight of evidence on that question."

The last quotation clearly indicates that if the evidence had been before this court in that case that it would have looked into it so far as to ascertain whether there was any sufficient evidence tending to show probable cause. And again, on page 261 the court said:

> "We do not, however, hold that when an indictment charges no offense against the laws of the United States, and the evidence given fails to show any, or if it appear that the offense charged was not committed or triable in the district to which the removal is sought, the court would be justified in ordering the removal, and thus subjecting the defendant to the necessity of making such a defense in the court where the indictment was found. In that case there would be no jurisdiction to commit nor any to order the removal of the prisoner." . . .
>
> "There must be some competent evidence to show that an offense has been committed over which the court in the other district had jurisdiction and that the defendant is the individual named in the charge, and there is probable cause for believing him guilty of the offense charged."

In the case at bar it appears from the opinion of the district judge that he did not consider the question of whether

the evidence introduced before him showed probable cause or the want of it. The only reasonable conclusion to be drawn from his opinion is that inasmuch as the indictment was, in his opinion, valid, it was conclusive, and that the question of probable cause could not and did not arise upon the evidence introduced. The circuit judge also seems to have taken the same view. No other construction can be given to his refusal to award the writ of certiorari. The appellant was entitled upon habeas corpus, as shown by the authorities hereinbefore cited, to have the question of probable cause determined upon habeas corpus even though the indictment was invalid upon its face.

See, also, United States *v.* Greene, 100 F. R. 941.

It is not contended that the court below or this court should weigh the evidence if it be conflicting, but that it should consider it for the purpose of determining whether there is any sufficient evidence before the Commissioner from which he might reasonably have found probable cause.

See, also—

Oteiza *vs.* Jacobus, 136 U. S. 330.

Bryant *vs.* United States, 167 U. S. 104.

In the case last cited, at page 105, the court says that the question to be determined upon habeas corpus in such cases is—

> "whether there was any *legal evidence* at all upon which the Commissioner could decide that there was evidence *sufficient* to justify his commitment for extradition."

In this connection it is to be remembered that the evidence introduced on behalf of the appellant before the Commissioner consisted of the testimony of the witnesses upon whose testimony the indictment was found, and the alle-

gation of the petition is that it had no tendency to show probable cause. He is entitled to the judgment of the court below and of this court upon that question.

He took the proper steps to have this evidence introduced before the court below for its consideration, and was clearly entitled to the writs of habeas corpus and certiorari as prayed, to the end that the evidence might be brought before the court. As the constitution provides that no warrant shall issue except upon probable cause, the appellant was and is entitled to have the judgment of the court below and of this court upon the question of whether the warrant under which he is held is thus supported. He alleges that it is not, and that the evidence showing that it is not was and is under the control of the court below, and that court committed error in declining to bring that evidence before it and pass upon the questions.

It is respectfully submitted that the order appealed from should be reversed.

WILLIAM B. HORNBLOWER,
CHARLES C. COLE,
Counsel for Appellant.

APPENDIX NO. 1.

43d Congress, 2d Session. } SENATE. { Report No. 658.

IN THE SENATE OF THE UNITED STATES.

February 16, 1875, ordered to be printed.

MR. EDMUNDS, from the Committee on the Judiciary, submitted the following report:

The Committee on the Judiciary respectfully reports, that on the 15th of December, 1874, the Senate adopted the following resolution:

"*Resolved*, That the Committee on the Judiciary be instructed to inquire into the extent and meaning of the act of June 22, 1874, entitled 'An act conferring jurisdiction upon the criminal court of the District of Columbia, and for other purposes,' and particularly whether under or by its provisions persons charged with or indicted for libel or other crime in the District of Columbia can be brought from a State or other place within Federal jurisdiction to said District, to answer therefor; and also, whether said act has any application to prosecution or indictment for the crime of libel in any case, and report thereon."

In obedience to this resolution the committee have carefully examined the subject.

The act of June 22, 1874, entitled "An Act conferring jurisdiction upon the criminal court of the District of Columbia, and for other purposes," is in the following words:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the criminal court of the District of Columbia shall have jurisdiction of all crimes and misdemeanors committed in said district not lawfully triable in any other

court, and which are required by law to be prosecuted by indictment or information.

"Sec. 2. That the provisions of the thirty-third section of the Judiciary Act of seventeen hundred and eighty-nine (1789) shall apply to courts created by act of Congress in the District of Columbia."

It having been considered that the provision in the act of June 17, 1870, establishing a Police Court in the District of Columbia, which conferred exclusive jurisdiction upon it of "all offenses against the United States not deemed capital or otherwise infamous," and which did not provide for trials by jury, were in violation of that clause in the constitution which declares that "the trial of all crimes, except in cases of impeachment, shall be by jury," the first section of the Act above quoted was passed in order to prevent a failure of justice in respect of a large class of crimes committed in the District, by giving the criminal court, with its jury, jurisdiction of such of them as under the Constitution could not, for the reason already stated, lawfully be tried in the Police Court.

By the second and only other part of the act in question it is declared "that the provisions of the thirty-third section of the Judiciary Act of seventeen hundred and eighty-nine (1789) shall apply to courts created by act of Congress in the District of Columbia."

The thirty-third section of the act of 1789 referred to is in the following words: "And be it further enacted, That for any crime or offense against the United States the offender may, by a justice or judge of the United States, or by any justice of the peace, or other magistrate of any of the United States where he may be found, agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by this act has cognizance of the offense; and copies of the process shall be returned as

speedily as may be into the clerk's office of such court, together with the recognizance of the witnesses for their appearance to testify in the case, which recognizances the magistrate before whom the examination shall be may require on pain of imprisonment; and if such commitment of the offender or the witnesses shall be in a district other than in which the offense is to be tried, it shall be the duty of the judge of that district where the delinquent is imprisoned, seasonable to issue, and of the marshal of the same district to execute, a warrant for the removal of the offender and the witnesses, or either of them, as the case may be, to the district in which the trial is to be had. And upon all arrests in criminal cases, bail shall be admitted, except when the punishment may be death, in which case it shall not be admitted, and by the Supreme or a circuit court, or by a justice of the Supreme Court, or a judge of a district court, who shall exercise their discretion therein regarding the nature and circumstances of the offense, and of the evidence and the usage of law. And if a person committed by a justice of the Supreme, or a judge of a district court, for an offense not punishable with death, shall afterwards procure bail, and there be no judge of the United States in the district to take the same, it may be taken by any judge of the Supreme or Superior court of law of such State.

As the act of June 22, 1874, mentioned in the resolution of the Senate, only extended to the court of the District of Columbia the provisions of the section just quoted, it follows that the inquiry is reduced to the single question, what are the provisions of that section which has been the law of the land for more than eighty years?

1st. The crime or offense upon which the section acts must be one against the United States.

2d. The offender can only be arrested upon the warrant of a court or judge of the State or district where he may be found. No court or judge can issue a warrant to arrest the offender in any other State or district.

3d. If the offender be thus arrested for an offense against the United States, and be brought before the court or judge of the district where he was arrested, he may be held for trial before such court of the United States as, by the act of September 24, 1789, had cognizance of the offense.

4th. The only courts having cognizance of any offense or case by that act are:

1. The Supreme Court of the United States.

2. The circuit courts of the United States established in the various States.

3. The district courts of the United States established in the various States.

No State court and no territorial court has by that act any jurisdiction whatever for the trial of any cause, civil or criminal.

5th. If it appears, when the offender is thus arrested and brought before the court or judge of the district of his arrest, that the offense was committed in some other district, it is made the duty of the judge to cause him to be removed to the district in which the offense was committed, the Constitution requiring all criminal trials to be in the district in which the offense was committed. It is scarcely necessary to say that the districts mentioned are the judicial districts of the United States created by acts of Congress in several States.

6th. The section gives no power to a court or judge to send or bring a person charged with crime into his district or jurisdiction under any circumstances. The authority given in this respect is only to remove the person charged *from* the district in the cases named.

The sum of the matter, therefore, is that the second section of the act of June 22, 1874, confers upon the courts of the District of Columbia the power to arrest offenders found in the District of Columbia who are charged with crime committed within the District and hold them for trial (which was the law before), and to arrest offenders found in

the District who have committed crimes against the United States in some judicial district of the United States and to send them to such district for trial, and that is all. No person can be brought into the District of Columbia under it, either for libel or any other crime. The committee are of opinion that both the sections of the act are necessary and proper and in perfect accordance with the principles of justice and the course of civilized jurisprudence. Without provisions of this character the District of Columbia would be an asylum for offenders committing crimes against the laws of the United States and escaping hither.

It only remains to report, as directed by the resolutions of the Senate, "whether said act has any application to prosecution or indictment for the crime of libel in any case."

We are of opinion that, as before stated, no person charged with the crime of libel can be brought into the District of Columbia under it, for no person can be brought here under it for any crime whatever.

And it is equally plain that no person charged with the crime of libel in any other district or place in the United States can be arrested here and sent to such district or place under it, for—

1st. Libel is not a crime against the laws of the United States in any of the States, so that no case could arise in which a court or judge in the District of Columbia could be called upon to arrest a person and send him to any State for trial for libel.

It should be here observed that the jurisdiction of the courts of the United States in criminal cases is confined to offenses created by the statutes of the United States.

No offense at common law is indictable or triable in the courts of the United States. This was early determined by the Supreme Court of the United States, and is the settled law of the land (Public Statutes; United States *vs.* Hudson, 7 Cranch, p. 32; Bishop's Criminal Law, sec. 199).

2d. If in any Territory libel is a crime by its laws, and if

such laws could be held for such purposes to be laws of the United States, the act under consideration provided no aid in sending a person from this District to such Territory, for the 33d section of the act of 1879 has no application whatsoever to the Territories.

The result is that the act of June 22, 1874, is not, in our opinion, obnoxious to any criticism, and in respect of the crime of libel it confers no power either to bring a person charged with it into the District of Columbia or send him out of it.

GEO. F. EDMUNDS.
ROSCOE CONKLING.
FRANK T. FRELINHUYSEN.
GEO. G. WRIGHT.
A. G. THURMAN.
A. W. STEVENS.

APPENDIX NO. 2.

Instructions Relative to Forest-Reserve Lieu Lands Selections.

Acts June 4, 1897 (30 Stat. 36), and June 6, 1900 (31 Stat. 614).
[Published in 31 Land Decisions, 372.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *July 7, 1902.*

Registers and Receivers, United States Land Offices.

GENTLEMEN: The act of Congress approved June 4, 1897 (30 Stat. 34, 36), provides among other things with respect to forest reserves established and to be established under section 24 of the act of March 3, 1891 (26 Stat. 1095)—

"That in cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the Government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected: *Provided further*, That in cases of unperfected claims the requirements of the law respecting settlement, residence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims."

By a subsequent act, approved June 6, 1900 (31 Stat. 614), it is declared—

"That all selections of land made in lieu of a tract cov-

ered by an unperfected bona fide claim, or by a patent, included within a public forest reservation, as provided in the act of June fourth, eighteen hundred and ninety-seven . . . shall be confined to vacant surveyed and non-mineral public lands which are subject to homestead entry not exceeding in area the tract covered by such claim or patent: *Provided*, That nothing herein contained shall be construed to affect the rights of those who, previous to October first, nineteen hundred, shall have delivered to the United States deeds for lands within forest reservations and make application for specific tracts of lands in lieu thereof."

This provision was reenacted March 3, 1901 (31 Stat. 1037).

GENERALLY.

1. Relinquishments under the above acts may include any tract within the limits of a forest reserve covered by an unperfected bona fide claim under any of the general land laws of the United States, or to which the full legal title has passed out of the Government and beyond the control of the Land Department by a patent or by that which is the full legal equivalent of a patent.

2. Mineral lands, whether covered by patent or not, can not be relinquished as bases for lieu selections under said acts.

3. Relinquishments made in pursuance of said acts must be executed, acknowledged, and recorded in the same manner as conveyances of real property are required to be executed, acknowledged, and recorded by the laws of the State or Territory in which the lands are situated.

4. Selections after October 1, 1900, are authorized to be made only of vacant, surveyed, non-mineral lands which are subject to homestead entry.

5. Selections filed prior to October 1, 1900, may embrace unsurveyed lands, but must, within thirty days from notice by the local officers of the filing in their office of the township plat of survey, be made to conform to such survey.

6. Selections of unsurveyed lands will not be passed to patent until after four months following the filing of said plat in the local office. This to enable any person claiming an adverse right therein to regularly assert the same.

7. The land relinquished and the land selected must be, as near as practicable, equal in area.

8. In a selection made prior to the receipt by the local officers of the instructions of this office, dated January 16, 1900, for less land than that relinquished, ninety days from notice is allowed the selector in which to make additional selection in full satisfaction of such relinquishment, or waive his right to do so, and in default thereof the relinquishment and the partial selection will be rejected. This is not a new rule, but rather a restatement of the existing practice.

9. The rule of approximation permitted in entries under the homestead and other public land laws may properly be applied to selections under the acts aforesaid (see 31 L. D. 225).

10. Should a selection be presented, based upon a relinquishment or reconveyance to the United States of lands which are not at the date of the filing of such selection within the limits of a forest reserve, the selection will be rejected, unless it appears that such lands were within the limits of such a reserve at the date of the recording on the proper records of such relinquishment or reconveyance.

11. Selections should be filed in the proper land office within a reasonable time after the relinquishment or reconveyance has been recorded in the manner indicated.

12. In all cases where the showing required in these instructions, both as to the title or claim to the land relinquished and as to the character and condition of the land selected, is not made by the selector at the time of filing the selection, you will reject the selection and give due notice thereof to the parties interested, in which notice the reasons for your action must be stated. Appeal from such action

may be taken under the rules as in other cases. At the expiration of the time allowed for appeal, you will forward the record with your report thereon.

13. If protest or objection shall be at any time filed against the selection, you will forward the same to this office for consideration in connection with the selection.

LAND COVERED BY PATENT OR PATENT CERTIFICATE.

14. Where the legal title to the relinquished land has passed out of the United States, there must be filed with each relinquishment a duly authenticated abstract of title showing that at the time the relinquishment was filed for record the legal title was in the party making the relinquishment and that the land was free from liability for taxes, pending suits, judgment liens, and from other encumbrance.

15. Where the legal title to the relinquished land has not passed out of the United States, but patent certificate therefor has issued and is outstanding, there must be filed with each relinquishment a duly authenticated abstract of title showing that at the time the relinquishment was filed for record the full equitable title was in the party making the relinquishment, and that the land was free from liability for taxes, pending suits, judgment liens, and from other encumbrance.

16. A relinquishment by an individual of land, the legal title to which has passed out of the United States, or for which patent certificate is outstanding, must show whether the person relinquishing is married or single; and, if married, the wife or husband of such person, as the case may be, must join in the execution of the relinquishment in such manner as to effectually bar any right or estate of dower, curtesy, or homestead, or any other claim whatsoever to the land relinquished, or it must be fully shown that under the laws of the State or Territory in which the relinquished land is situated such wife or husband has no interest whatever, present or prospective, which makes her or his joinder in the relinquishment necessary.

17. Selections in lieu of lands covered by patent or patent certificate may embrace contiguous or non-contiguous tracts in the same land district.

18. All papers and proofs necessary to complete a selection must be filed at one and the same time, and until they are all presented no right will vest under the selection.

19. A selection based upon land covered by a patent or by a patent certificate must be made by the owner of the land relinquished or by a duly authorized agent or attorney-in-fact, and when made by an agent or attorney-in-fact proof of authority must be furnished.

20. No fees or commissions are required to be paid in any selection made in lieu of land covered by a patent or by a patent certificate.

21. The affidavit to support a selection based upon the relinquishment of land covered by a patent or by a patent certificate must be made by the selector, or by some credible person possessed of the requisite personal knowledge in the premises, and must be filed with and as a part of the selection. This affidavit must show that the selected land is non-mineral in character, that it contains no salt springs or deposits of salt in any form, sufficient to render it chiefly valuable therefor; and that it is not in any manner occupied adversely to the selector. (Form 4–061*a*.)

22. In making selections in lieu of relinquished lands covered by patent or patent certificate, Form 4–643, or its equivalent, should be used; and in every such selection the selector must show, to the satisfaction of the local officers, by affidavit or otherwise, in addition to the other proofs required, that the relinquished land does not constitute the basis for any other selection made by him, and also whether or not the selected land is situated within six miles of a mining claim.

23. Where the selection is within six miles of a mining claim or within a mineral township you will require the selector, within twenty days from the filing of his selection,

to begin publication of notice thereof at his own expense in a newspaper to be designated by the register as of general circulation in the vicinity of the land and published nearest thereto. Such publication must cover a period of thirty days, during which time a similar notice of the selection must be posted in the local land office and upon each and every non-contiguous tract included in the selection.

24. The notice should describe the land selected and give the date of selection, and state that the purpose thereof is to allow all persons claiming the selected land under the mining laws, or desiring to show it to be mineral in character, an opportunity to file objection to such selection with the local officers for the land district in which the land is situate and to establish their interest therein or the mineral character thereof.

25. Proof of publication shall consist of an affidavit of the publisher, or of the foreman, or other proper employee of the newspaper in which the notice was published, with a copy of the published notice attached. Proof of posting upon the land, and that such notice remained posted during the entire period required, shall be made by the selector or some credible person having personal knowledge of the fact. The register shall certify to posting in his office. The first and last dates of such publication and posting shall, in all cases be given.

26. Where, at the time of the filing of a selection in lieu of relinquished land covered by a patent or by a patent certificate, the showing required by these instructions is fully made by the selector, the selection will be received by the register and receiver and proper notation thereof made upon their records. If publication of notice of the selection, as provided in paragraphs 23, 24, and 25, of these instructions, is not necessary, the selection, when so received and noted of record, will be forthwith forwarded to the Commissioner of the General Land Office for his action thereon. If publication shall be necessary under said paragraphs 23,

24, and 25, the selection will, after such publication is completed, be promptly forwarded to the Commissioner of the General Land Office for his action. The action of the Register and Receiver in receiving a selection and making notation of the same upon their records will not in itself operate to confer any right upon the selector, such as to prevent the subsequent rejection of the selection, where it is found that the selection as made was defective in any essential particular and for that reason should have been rejected.

UNPERFECTED BONA FIDE CLAIMS NOT COVERED BY PATENT CERTIFICATE.

27. Where the land relinquished is covered by an unperfected bona fide claim, for which no certificate for patent is outstanding, there must be filed with the selection a certificate by the recorder of deeds or official custodian of the records of transfers of real estate in the proper county that no instrument purporting to convey or in any way encumber the title to the land, or any part thereof, is on file or of record in his office; or if any such instrument or instruments be on file or of record therein, the certificate must show the facts.

28. A selection in lieu of an unperfected claim not covered by patent certificate must in all respects conform to the law under which such unperfected claim is held, and will be subject to the payment of such fees and commissions as would be required under the statute to complete the unperfected claim in lieu of which the selection is made.

29. If the land relinquished is covered by an unperfected claim, such as a homestead or desert entry, to which certificate for patent has not issued, and the law under which the claim was initiated requires that land taken thereunder must be in one body, the same requirement must be observed in making the lieu selection.

30. A selection of land in lieu of an unperfected claim held under the settlement laws, if credit for residence on the

unperfected claim be desired, must, in addition to other proofs, be accompanied by the affidavit of the selector, corroborated by two witnesses, showing when residence was established on the unperfected claim and the duration of such residence. In such a case, unless the selector has resided upon, cultivated, and improved the relinquished unperfected claim for the full period required by law to earn a patent thereto, he must establish and maintain a residence on the land selected, and cultivate and improve the same for the full period required by law to earn a patent, less the time spent upon the relinquished unperfected claim.

31. If the relinquished unperfected claim be not one held under the settlement laws, the affidavit as to residence required by the preceding paragraph need not be furnished; but in either case the selector must make affidavit that he has not sold, assigned, mortgaged, or contracted to sell the land covered by the relinquished unperfected claim.

32. In case a settler on an unsurveyed tract within a forest reserve desires to make a change of settlement to land outside of the reserve and receive credit for previous residence on the relinquished claim, he must file his selection in the same manner as provided with respect to selections in lieu of other unperfected claims, accompanied by the affidavit as to residence required in such cases, and should describe his unsurveyed claim with sufficient accuracy to enable the local land officers to approximately determine its location.

33. In making selections in lieu of relinquished unperfected bona fide claims, not covered by patent certificate, Form 4–634, or its equivalent, should be used; and every such selection must also be supported by affidavit the same as required by paragraph 21 of these instructions (Form 4–061*a*). In such selections special notice of the selection by publication or otherwise will not be required.

34. Selections in lieu of relinquished unperfected bona fide claims not covered by patent certificate, where the

essential requisites shall have been fully complied with by selectors at the time of filing their selections, will be received and noted of record in the same manner and upon the same conditions as provided in paragraph 26 of these instructions, and will be forthwith forwarded to the Commissioner of the General Land Office for his action thereon.

35. A strict observance of these instructions will be required.

All previous circulars or instructions in conflict herewith are hereby revoked.

Very respectfully, BINGER HERMANN,
Commissioner.

Approved:
E. A. HITCHCOCK, *Secretary.*

4—643. **Perfected Claims.**

SELECTION IN LIEU OF LAND IN ——— FOREST RESERVE.

[Act June 4, 1897.]

To the Register and Receiver, United States Land Office

———, ———.

GENTLEMEN: I am the owner of the ——— Meridian, containing ——— acres; that said land is situate and lying within the boundaries of the ——— Forest Reserve; that I desire to relinquish and reconvey said land unto the United States, and in lieu thereof to select the ——— land district, State of ———, and containing ——— acres, under the provisions of the act of June 4, 1897 (30 Stat. 36).

In compliance with the regulations under said act I have made, executed, and caused to be recorded in the proper county and State, a deed of reconveyance to the United States of the tract first above described and situate within said ——— Forest Reserve, and in relation thereto have caused a proper abstract of title to be made and authenticated, both of which are herewith submitted.

There are also submitted certificates from the proper officers showing that the land relinquished, or surrendered,

is free from encumbrance of any kind; also that all taxes thereon, to the present time, have been paid, and an affidavit showing the lands selected to be non-mineral in character and unoccupied. I therefore ask that a United States patent issue to me for the tract or tracts thus selected.

——— ———.

Dated, ———.

LAND OFFICE AT ——— ———,

——— ———, 190—.

I, ——— ———, register of the Land Office, do hereby certify that the land above selected, in lieu of the land herein relinquished to the United States, is free from conflict, and that there is no adverse filing, entry, or claim thereto.

——— ———,

Register.

Selection approved by the Commissioner of the General Land Office, per letter "R" to Register and Receiver ——— ———, 190—.

———, Div. "R."

Former regulations were like the foregoing in all particulars material to the questions raised in this case, and are found published in the land decisions as follows:

Act of June 4, 1897, 30 Stat. 36.
Circular, June 30, 1897, 24 L. D. 589.
Circular, March 21, 1898, 26 L. D. 421.
Circular, April 26, 1899, 28 L. D. 328.
Circular, May 9, 1899, 28 L. D. 521.
Circular, December 18, 1899, 29 L. D. 391,
Circular, March 6, 1900, 29 L. D. 578.
Circular, March 6, 1900, 29 L. D. 580.
Circular, March 9, 1900, 29 L. D. 594.
Circular, April 4, 1900, 30 L. D. 23.
Circular, July 5, 1900, 30 L. D. 113.
Circular, March 19, 1901, 30 L. D. 538.
Circular, April 10, 1901, 30 L. D. 590.
Circular, February 19, 1902, 31 L. D. 251.

APPENDIX NO. 3.

IN THE DISTRICT COURT OF THE UNITED STATES,
NORTHERN DISTRICT OF CALIFORNIA.

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES FOR THE REMOVAL FOR TRIAL OF F. A. HYDE AND HENRY P. DIMOND FROM THE NORTHERN DISTRICT OF CALIFORNIA TO THE DISTRICT OF COLUMBIA.	No. 4198.

Opinion.

Francis J. Heney, special assistant Attorney-General; Arthur B. Pugh and Oliver E. Pagin, special assistant U. S. attorneys, and Marshall B. Woodworth, U. S. attorney.

G. W. McEnerney and Bert Schlesinger for defendant F. A. Hyde.

Samuel Knight for defendant Henry P. Dimond.

DEHAVEN, District Judge. This is an application under section 1014 of the Revised Statutes for a warrant to remove the defendants, Hyde and Dimond, from the Northern District of California to the District of Columbia, for trial upon an indictment found by the grand jury of the Supreme Court of that district. The indictment contains forty-two counts. The first count is the only one that it will be necessary to consider. It is therein charged that on December 30, 1901, Frederick A. Hyde, John A. Benson, Henry P. Dimond, and Joost H. Schneider, entered into a conspiracy in the District of Columbia to defraud the Government of the United States out of its title to large tracts of the public lands open to selection under the laws of the United States in lieu of lands included within the limits of forest reservations established and to be established in the

States of California and Oregon; that the object of this conspiracy was to be accomplished by means of a fraudulent practice "whereby the said Frederick A. Hyde and John A. Benson were to obtain fraudulently from the said States of California and Oregon title and possession of school lands lying within the limits of such forest reserve and open to purchase from those States, by residents thereof, respectively, . . . in quantities not exceeding, for each of such residents, 640 acres in the said State of California and 320 acres in the said State of Oregon, upon application being made to the proper authorities of the said States, respectively, by any such resident, supported by his affidavit, showing . . . his intention to purchase such lands in good faith and for his own benefit, and that he has made no contract or agreement to sell the same—which said school lands were to be so obtained from the said States by making and filing with the said authorities applications for the purchase of the same, and assignments of the same, and of the certificates of purchase thereof, in the names of fictitious persons, and in the names of persons not really desiring and not qualified, to purchase the same, (the use of which last mentioned names for such purposes the said Frederick A. Hyde and John A. Benson would procure by paying and causing to be paid to such persons, respectively, small sums of money, and by falsely representing and causing to be represented to some of such persons that they were merely disposing of their respective rights to purchase such school lands), and by supporting such applications with forged affidavits and fraudulent affidavits, false and known to the said Frederick A. Hyde and John A. Benson to be false, in this, that they would purport to be, some . . . the affidavits of real persons and others the *bona-fide* sworn affidavits of the persons whose names were signed thereto, whereas in truth and in fact the former would be the affidavits of fictitious persons, and would not be the affidavits of real persons or affidavits sworn to by any

person, and the latter would not be *bona-fide* or sworn affidavits of the persons whose names were signed thereto, because such latter affidavits would not only state that the affiants therein were persons qualified under the laws of said state of California, or of the said state of Oregon, as the case might be, to make such applications and to purchase such lands, by reason, amongst other things, of their intending to purchase the same in good faith and for their own benefit, respectively, and of their having made no contract or agreement to sell the same, while in truth and in fact none of such real persons would intend to purchase such lands in good faith for his own use or benefit at all, but would be either knowingly aiding and assisting the said Frederick A. Hyde and John A. Benson in their said fraudulent practice or innocently acting upon their false representations, but because, also, the said latter affidavits would not in truth and in fact have ever been sworn to at all by any of the persons whose names were signed thereto; and whereby the said Frederick A. Hyde and John A. Benson were to cause to be relinquished, assigned, transferred, and conveyed, by means of false and forged relinquishments, assignments, and conveyances, to the said United States, either directly or indirectly, either through the said Frederick A. Hyde, or through divers agents and attorneys of the said Frederick A. Hyde and John A. Benson, . . . as would be found convenient or nesessary, the pretended rights of such fictitious persons, respectively, and require and procure such real persons to make relinquishments, assignments, transfers and conveyances, either directly, or indirectly, through the said Frederick A. Hyde, or through the said agents and attorneys of the said Frederick A. Hyde and John A. Benson, as would be found convenient or necessary to the said United States, of the titles to and possession of such school lands so by the use of the names of such real persons fraudulently to be obtained from the said States, and this, in

either case, in exchange as aforesaid for public lands to be selected, and for titles thereto by patent to be obtained, by and on behalf of the said Frederick A. Hyde and John A. Benson in the names of such fictitious or real persons, or in the names of the said Frederick A. Hyde, under the designation of F. A. Hyde; Crawford W. Clarke, under the designation of C. W. Clarke; A. S. Laldwin or Isaac Liebes, or under the name of Elizabeth Dimond; or of F. A. Hyde & Co., as would be found convenient or necessary, from the public lands of the United States, in lieu of such school lands lying within the limits of such forest reserves as aforesaid.

1. The defendants resist removal and insist that the facts set out in the indictment do not sufficiently charge them with a conspiracy to defraud the United States, within the meaning of section 5440 of the Revised Statutes. "*It is well settled that on an application for a warrant of removal under section 1014 of the Revised Statutes, it is the duty of the judge to inquire into the sufficiency of the indictment, where the application for removal is based upon the indictment alone, and if in such case the indictment does not charge an offense, the warrant should be refused.*" The first question, then, for consideration at this time is that which relates to the sufficiency of the indictment. Do the facts set forth in the first count show that the defendants entered into a conspiracy to defraud the United States out of the title to any of its public lands? It is claimed by the Government that the indictment should be construed as charging in addition to other matters that the defendants conspired together to obtain from the States of California and Oregon patents for school lands in the names of fictitious persons, and then to exchange the apparent title so obtained for lands of the United States; and for the purpose of effecting such exchange were to give to the United States forged conveyances executed in the names of such fictitious patentees, purporting to convey to the United States land covered by such patents, and also

deeds executed by apparent grantees of such fictitious persons purporting to convey to the United States other portions of such patented land. If such is the true construction of the indictment, there can be no doubt that it sufficiently charges the defendants with a conspiracy to defraud the United States out of the title to the lands which it might give in exchange for such fictitious titles. A patent issued in the name of a fictitious person conveys no title; it is not simply voidable but absolutely void. Moffatt *vs.* United States, 112 U. S. 24; United States *vs.* Southern Colorado Coal and Town Co., 18 Fed. 273. But I am not satisfied that the contention by the Government as to the construction of the indictment in this respect can be sustained. The most direct and certain allegation in the indictment is that the conspiracy contemplated that the defendants, "Frederick A. Hyde and John A. Benson, were to obtain fraudulently from the said States of California and Oregon title to and possession of school lands lying within the limits of forest reserves and open to purchase from those States." The indictment them proceeds to set forth that one of the ways by which such title was to be fradulently acquired was for Hyde and Benson to make and file "with the said authorities applications for the purchase of the same, and assignments of the same, and of the certificates of purchase thereof, in the *names of fictitious persons.*" If this allegation means anything at all, it is that the applications were to be fraudulently made in the *names of fictitious persons*, and that purported assignments of the certificates of purchase which might be issued thereon should also be filed with the authorities of the State. In that event the patent would issue to the person named as assignee in such fraudulent assignment, and the legal title would also pass to him. There is no direct averment that the defendants were to obtain any patent from either of the States referred to in which a fictitious person should be named as grantee. The indictment is certainly subject to

very severe criticism because of lack of precision and singleness in its statement of facts; but I think upon consideration of all of its allegations, the first count may be construed as charging in substance that the defendants entered into a conspiracy to obtain from the United States title to public lands situate outside of forest reservations in exchange for school lands within forest reservations, the title to which was to be fraudulently obtained from California and Oregon by the defendants Hyde and Benson, upon applications filed in the names of fictitious persons, and upon purported assignments of the rights of such fictitious persons to patents, and in the names of persons whose applications to purchase were to be supported by the false and fraudulent affidavits referred to in the indictment. It will thus be seen that the object of the alleged conspiracy was to enable the defendants Hyde and Benson to obtain from the United States a perfect title to certain of its public lands in exchange for school lands situate in forest reservations, to which they held only the naked legal title, the equitable title thereto being either in the State of California or Oregon. Upon the part of the defendants it is insisted that affecting such exchange of land in the manner and under the circumstances set forth in the indictment, would not be a fraud upon the United States, for the reason that in such transaction the Government would be an innocent purchaser and therefore receive a perfect title to the lands conveyed to it. The soundness of this proposition can not be conceded. The law under which the exchange of lands referred to in the indictment was to be made, is as follows:

"That in cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the Government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent" (30 Stats. p. 36).

This constitutes an offer upon the part of the Government to exchange its vacant lands open to settlement, acre for acre, for land included within forest reservations, held in private ownership or to which an unperfected bona fide claim has attached; and so far as relates to land covered by a patent, the offer is made to the owner of such land. Who is then to be regarded as the owner of land covered by patent within meaning of this statute? To my mind it is clear that the word owner, as therein used, refers to only one who holds both the legal and equitable title to the patented land. It can not be doubted that if a person should apply to exchange lands under this statute, and at the time of tendering his conveyance to the Government should inform the officers of the Land Department that the title that he proposed to relinquish was one which he had obtained by the perpetration of such frauds as are described in the indictment, and that therefore there was an outstanding superior equitable title, the officers of the Land Department could not, without violation of this statute, accept such fraudulent and imperfect title in exchange for public lands of the United States. It would be the duty of the Land Department to reject the application, because a title, which in the hands of the person relinquishing it is tainted with fraud and therefore voidable, is not the kind of title which the law contemplates the Government shall receive in exchange for its lands. If this is the proper construction of the statute, then it necessarily follows that no one can obtain the benefit of its provisions without making an express or implied representation that he is the owner, both in law and in equity, of the land which he tenders to the United States in exchange, and if such representation is not true and was known to be false when made, it would constitute a fraudulent representation and the Government would be entitled to a cancellation of the patent issued upon the faith of such representation. It would be no answer to a bill filed for the cancellation of the patent to say that the Government was not defrauded by

such a transaction because it might protect itself from loss or damage by showing that it had no notice of an outstanding equitable title to the lands received by it. The Government would be defrauded because it was induced to part with the title to its lands upon the fraudulent representation that the person with whom it was dealing had a perfect title to the lands which he relinquished to it in exchange. It may be stated as an elementary principle of law that one who has been induced by fraudulent representations to enter into a contract which he would not have done except for such representations, is entitled to rescind such contract because of the fraud thus practiced upon him, and in McAleer *vs.* Horsey, 35 Md. 439, in discussing the question as to what false representations will be deemed material, it is said:

"No better rule can be given for deciding the question than this—if the fraud be such that had it not been practiced the contract would not have been made or the transaction completed, then it is material to it; but if it is shown or made probable that the same thing would have been done in the same way, if the fraud had not been practiced, it can not be deemed material."

So, also, in the case of MacLaren *vs.* Cochran, 44 Minn. 255, the rule is stated in this language:

"If a party is induced to enter into a contract by fraudulent representations as to a fact which he deems material, and upon which he has a right to rely, he may rescind the contract upon discovery of the fraud, and the party in the wrong should not be heard to say that no real injury can result from the fact misrepresented."

In speaking of the implied representation which is made by one who tenders to the Government a deed of land which he desires to exchange for public lands under the statute, above referred to, the Supreme Court, in Cosmos Exploration Company *vs.* Gray Eagle Oil Co., 190 U. S. 301, say:

"So far as his action goes, it is an assertion upon his part that he is the owner in fee simple of the land he proposed to

relinquish, and that the deed conveys a fee simple title to the Government, and also that he has selected vacant land which is open to settlement, and that therefore he is entitled to a patent for such land."

But one can not truthfully assert that he is the owner of land in fee simple if there is outstanding in another a superior equitable title. Ownership in fee simple implies something more than being the holder of the naked legal title to land. It implies the entire title and estate in land, or as it is sometimes defined: "An estate in fee simple is the greatest estate or interest which a person can possess in landed property." 11 Am. & Eng. Ency., 2d ed., 366.

My conclusion, therefore, upon this point is that the defendants in combining together to obtain the title to public lands of the United States in exchange for lands to which they held only the naked legal title, the equitable title thereto being in the States of California and Oregon, conspired to defraud the United States within the meaning of section 5440 of the Revised Statutes.

2. The defendants also resist removal upon the ground that section 1014 of the Revised Statutes does not authorize the removal of a defendant from one judicial district of the United States to the District of Columbia for trial. This question was presented in the cases of In re Buell, 3 Dill. 116, Fed. Cas. No. 2, 102, and In re Benson, Fed. 486, and it was held in both that section 1014 of the Revised Statutes, when read in connection with other statutes of the United Statutes, gives ample authority for such removal; and Judge Dillon, delivering the opinion of the court in the first case, used the following language, which I adopt as an expression of my own views:

"The District of Columbia is not a sanctuary to which persons committing offenses against the United States may fly and be beyond the reach of justice, nor is the law so defective that persons there committing such offenses and escaping or found elsewhere can not be taken back there for trial."

APPENDIX NO. 4.

So much of the provisions of the California laws on this subject as are material to the questions involved here are found in the Political Code of that State, and are as follows:

Pol. Code, sec. 3494:

"The unsold portion of the five hundred thousand acres granted to the State for school purposes, the sixteenth and thirty-sixth sections, and lands selected in lieu thereof, must be sold at the rate of one dollar and twenty-five cents ($1.25) per acre, in gold coin, payable, twenty per cent of the principal within fifty days from the date of the certificate of location issued to the purchaser; the balance, bearing interest at the rate of seven per cent per annum, in advance, is due and payable within one year after the passage of any act by the legislature requiring such payment, or before, if desired by the purchaser."

Pol. Code, sec. 3495:

"Any person desiring to purchase any portion not less than the smallest legal subdivision of any of the lands mentioned in section thirty-four hundred and ninety-four, situated in any township which has been surveyed by the United States, must make an affidavit that he is a citizen of the United States, or has filed his intention to become such, a resident of this State of lawful age, that he desires to purchase such lands (describing the same by legal subdivisions) under the provisions of this title; that there is no occupation of such lands adverse to any that he has, or if there is an adverse occupation the affidavit must show that the township has been sectionized three months, and that the adverse occupant (giving his name) has been in such

occupation more than sixty days since the plat was filed in the United States Land Office; that he desires to purchase the same for his own use and benefit, and for the use or benefit of no other person or persons whomsoever, and that he has made no contract or agreement to sell the same. The affidavit must also state whether the land is or is not suitable for cultivation, and if it is, that the applicant is an actual settler thereon, and that he has not entered any portion of any lands mentioned in section thirty-four hundred and ninety-four, which, together with that now sought to be purchased, exceeds three hundred and twenty acres; but if the land is not suitable for cultivation the affidavit must further state that the applicant has not entered any portion of such lands, which, together with that now sought to be entered, exceeds six hundred and forty acres. Lands unsuitable for cultivation may be sold in quantities not exceeding six hundred and forty acres to any one person, under the restriction other than as to actual settlement prescribed for the sale of cultivable lands. The surveyor general and register of the land office must make and enforce all necessary rules and regulations to prevent the sale of school lands suitable for cultivation to any person not an actual settler thereon; provided, that any smallest legal subdivision of school lands shall be deemed suitable for cultivation if any part not less than one half of its area will, without artificial irrigation, but with or without the clearing of timber or other growth therefrom, by the ordinary processes of tillage, produce ordinary agricultural crops in average quantity; and provided, that any contest of the applicant's right to purchase, arising from the character of the land as cultivable or otherwise, may be referred to the superior court of the proper county, as in other cases, for determination; and provided further, that no contest of the applicant's right to purchase, arising from adverse occupation, shall be maintained, except by a prior adverse occupant,

who shall have filed an application to purchase the land under the provisons of this section, and no occupation of land by a person other than the applicant shall be an adverse occupation within the meaning of this section, unless such occupation is by a person who is entitled to purchase the same under the provisions hereof, and who files his application therefor within the time prescribed by section thirty-four hundred and ninety-seven of this Code."

Pol. Code, sec. 3496:

"If the applicant is a female, the affidavit must show that she is entitled to purchase and hold real estate in her own name."

Pol. Code, sec. 3500:

"Any false statement contained in the affidavit provided for in section three thousand four hundred and ninety-five, defeats the right of the applicant to purchase the land, or to receive any evidence of title thereto, and, if wilfully false, subjects him also to punishment for perjury. Timber lands belonging to this State shall be sold for cash only, and the surveyor-general and register of the State land office must make and enforce all necessary rules and regulations to prevent the sale of or issuance of any evidence of title to any timber lands of this State, except on payment in cash, of the full price fixed therefor by law."

Sec. 3512. Payments, how made. Whenever any survey or location has been made or approved the purchaser must, within fifty days from the date of approval or location, present his copy of the same to the county treasurer of the county in which the land, or some part thereof, is situated, who must receive the amount to be paid, and the fee for the certificate of purchase, indorsing his receipt therefor upon the certificate of location or survey, and returning it to the purchaser. En. March 12, 1872.

Sec. 3514. Certificate of purchase. Evidence of title.

Whenever the register receives from the county treasurer a statement showing that an applicant for State lands has made the first payment he must issue to the person entitled thereto a certificate of purchase, showing the class of land purchased, the number of acres, the price per acre, the date of payment, the date from which the interest is to be computed, the amount paid, and the amount remaining unpaid, which certificate is prima facie evidence of title. En. March 12, 1872. Am'd 1873–4, 52.

Sec. 3515. Certificates of purchase may be sold. Certificates of purchase and all rights acquired thereunder are subject to sale by deed or assignment executed and acknowledged before any officer authorized by law to take acknowledgments of conveyances of real property or before the register. En. March 12, 1872.

Sec. 3516. Sale to be recorded. All such sales must, when the deed or assignment is recorded by the county recorder, be reported by him to the register, to be entered in the books of his office. En. March 12, 1872.

Sec. 3519. Register to prepare patents, when. Whenever final payment has been made for any tract of land, the selection of which has been accepted and approved by the United States authorities, or when the tract finally paid for or reclaimed is swamp and overflowed, salt marsh, or tide lands, the register, upon the surrender of the certificate of purchase by the person entitled to the same, must prepare a patent for the land, and send it to the governor, together with a certificate that the laws in relation thereto have been complied with, that payment in full has been made, and that the party named in the prepared patent is entitled to it. En. March 12, 1872.

Sec. 3520. Patent, how executed. The patent must then be signed by the governor, attested by the Secretary of State, sealed with the great seal of the State, and be countersigned by the register. En. March 12, 1872.

Sec. 3522. Patents to be recorded and delivered. The register must record all patents in books to be kept in his office for that purpose and then deliver them to persons entitled thereto. En. March 12, 1872.

The corresponding provisions of the Oregon laws are as follows:

Laws 1899, p. 157, sec. 2:

"The governor, secretary of State, and State treasurer, as a board of commissioners, for the sale of school and university lands and for the investment of the funds arising therefrom, shall be styled the 'State land board,' and such board shall have power and is hereby authorized to use a common seal, and the secretary of State shall procure such seal for said board."

Laws 1899, p. 157, sec. 6:

"The State land board may make rules for the transaction of business under this act. They shall meet on the second and fourth Tuesdays of each month to pass upon all matters properly coming before the board for consideration, to hear and decide all questions about priority of settlement and other disputes between applicants; and all their acts and decisions as to the legal title shall be final as to the right to a deed from the State. All necessary expenses for books, maps, blanks, stationery, postage, and other incidental expenses shall be audited, upon proper vouchers, and paid out of the interest fund, upon the order of the board."

Laws 1899, p. 158, sec. 7:

"The State land board is hereby authorized to sell all lands acquired by grant from the United States at not less than one dollar and twenty-five cents per acre, except swamp and overflowed lands, which shall be sold at not

less than one dollar per acre, and except indemnity school lands selected under the provisions of the act approved February 19, 1895, now unsold and to which no valid right to purchase has attached, which are hereby withdrawn from sale; provided, that no lands, which have reverted or shall hereafter revert to the State by reason of the non-payment of the balance of the purchase money or interest thereon shall be sold for a less price than that for which they were originally sold; provided, that not more than three hundred and twenty acres of any one kind of land shall be sold to one person."

Laws 1899, p. 158, sec. 9:

"Any person over eighteen years of age, who is a citizen of the United States or has declared intention to become such, is entitled to purchase any of the lands of the State, and any such person desiring to purchase any of the lands of the State shall file with the State land board an application to purchase, which application shall contain a precise description of the lands applied for according to the United States survey thereof, if the same shall have been surveyed by the United States, or, if not so surveyed, then the description shall be according to an accurate survey made by the county surveyor at the instance and cost of the applicant. This application shall be accompanied by the affidavit of the applicant, taken before some notary public or county clerk, to the effect that he or she is over eighteen years of age and a citizen of the United States, or has declared his or her intention to become such, and that the proposed purchase is for his or her own benefit and not for the purpose of speculation; that he or she has made no contract or agreement, expressed or implied, for the sale or disposition of the land applied for in case he or she is permitted to purchase the same, and that there is no valid adverse claim thereto."

Laws 1899, p. 159, sec. 12:

"Where full payment of the purchase price is made at the time of the purchase, or in case payment is made in installments, then upon full payment of the installments, principal and interest, as provided in section 3304, the purchaser shall receive a deed substantially in the following form:

"In consideration of.....dollars paid to the State land board, the State of Oregon does hereby grant, bargain, sell, and convey unto.....the following described lands, to wit:.....(here insert description), to have and to hold the same unto the said....., heirs and assigns forever.

"Witness the seal of the State land board affixed this, the .....day of....., 19.....

.....Governor.

.....Secretary.

(L. S.) .....Treasurer."

"Which deed, without acknowledgment, shall be admitted to record, and shall convey to the grantee all the estate which the State has in the land at the date thereof; and the board shall preserve in a bound volume a true copy of all such deeds, with an alphabetical index of the names of grantees, and such copies shall be primary evidence of such conveyance."

APPENDIX NO. 5.

12th L. D., 499.

"CIRCULAR OF INSTRUCTIONS RELATING TO TIMBER RESERVATIONS.

"WASHINGTON, D. C., *May 15, 1891.*

"*To Special Agents of the General Land Office.*

"GENTLEMEN: Your attention is hereby called to section 24 of the act of Congress approved March 3, 1891, entitled 'An act to repeal timber-culture laws, and for other purposes,' which reads as follows:

"'Sec. 24. That the President of the United States may from time to time set apart and reserve, in any State or Territory having public lands bearing forests, (in) any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations; and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof.'

"To carry into effect said provisions it becomes important to reserve all public lands bearing forests, or covered with timber or undergrowth, on which the timber is not absolutely required for the legitimate use and necessities of the residents of the State or Territory in which the lands are situated, or for the promotion of settlement or development of the natural resources of the section of the State or Territory in the immediate vicinity of the particular lands in question.

"In so doing, it is of first importance to reserve all public lands in mountainous and other regions which are covered with timber or undergrowth at the headwaters of rivers and

along the banks of streams, creeks, and ravines, where such timber or undergrowth is the means provided by nature to absorb and check the mountain torrents, and to prevent the sudden and rapid melting of the winter's snows and the resultant inundation of the valleys below, which destroy the agricultural and pasturage interests of communities and settlements in the lower portions of the country.

"For the purpose of securing the necessary data upon which to base recommendations for such forest reservations, the following instructions are issued:

"Special agents upon being detailed to secure the data in question, will proceed, without undue delay, to make in the district assigned to them a thorough and careful personal examination of the public lands bearing forest or covered with timber or undergrowth, and ascertain by personal observation and by interviews with Government and State officials in the vicinity of such lands, and with citizens who have an interest in the public welfare, all facts pertaining to the value of said forests or timber lands for all uses, purposes, and requirements. The result of such investigations should be duly made the subject of report to this office.

"In submitting such reports a recommendation should be made in each case as to whether the lands described should be set apart as a public reservation, setting forth in full the reasons for arriving at the conclusions stated. The agent should also in every instance, so far as practicable, procure and submit with his report, the expression of opinion, in writing, of the officials and citizens interviewed by him relative to the special value of each tract or area of land reported upon.

"In recommending reservations of timber lands, special agents should describe such lands by natural drainage basins; and whenever it is in the interest of the industry carried on in the district to except any lands within said basins from reservation, by permitting the timber to be cut to meet the wants of the people, such ex-

cepted tract should be described, in Land Office terms, as sections, townships, ranges, etc.; but when surveys have not been extended over the lands thus excepted, the lands should be described by natural boundaries in such a manner that they may be readily distinguished from other lands, and that proper provision for their survey by Land Office methods may be made.

"After making an examination of the timber lands of any drainage basin, and having decided to recommend the same for reservation under the provisions of this circular, before submitting report in the matter a notice should be prepared by the agent stating that such recommendation will be made to the General Land Office, and setting forth the description of the basin, together with a description of any public lands embraced therein which it may be proposed to have excepted therefrom. It should also be stated therein that the object of such publication is to give timely notice of the proposed reservation in order that all parties interested, who either favor or oppose its establishment, may be afforded due opportunity to submit their views to this office, by petition or otherwise, for the purpose of having the same considered prior to the final establishment of such reservation. This notice should be posted in the land office or offices of the district wherein such lands are situated, and a copy of the same should be published at least once a week for three successive weeks in some newspaper published in the county, or each of the counties, wherein such lands are situated; and also in at least one of the newspapers of general circulation in the State or Territory. If no newspaper be published in the county or counties in which the lands are situated, then the publication should be made in a newspaper published in the county nearest to such lands.

"A printed copy of the notice of publication should be submitted with the agent's report, together with the affidavit of the publisher or foreman of each newspaper attached

thereto, showing that the same was successively inserted the requisite number of times, and the dates thereof.

"Should knowledge be acquired by the agent that any particular tract or tracts of public timber land are being, or are likely at an early day to be despoiled of the timber which should be preserved for climatic, economic, or other public reasons, and that the early reservation thereof is necessary, the agent should report the matter at once to this office, describing, in general, the location of said lands, and stating reasons for believing that necessity exists for early action. Should the services of a surveyor be required to locate and define by proper exterior bounds and lines any tract or tracts therein which should be excepted from reservation, he should submit an estimate as to the total cost of such survey and the time required to complete same. Upon receipt of such report proper measures will be promptly taken by this office in the premises."

Very respectfully,

"T. H. CARTER,
Commissioner."

"Approved:

"GEO. CHANDLER,
"*Acting Secretary.*

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 406.

FREDERICK A. HYDE, APPELLANT,

vs.

JOHN H. SHINE, UNITED STATES MARSHAL IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA, ET AL.

Appeal From the Circuit Court of the United States for the Northern District of California.

Supplemental Brief on Behalf of the Appellant.

WILLIAM R. HORNBLOWER,
CHARLES C. COLE,
Counsel for Appellant.

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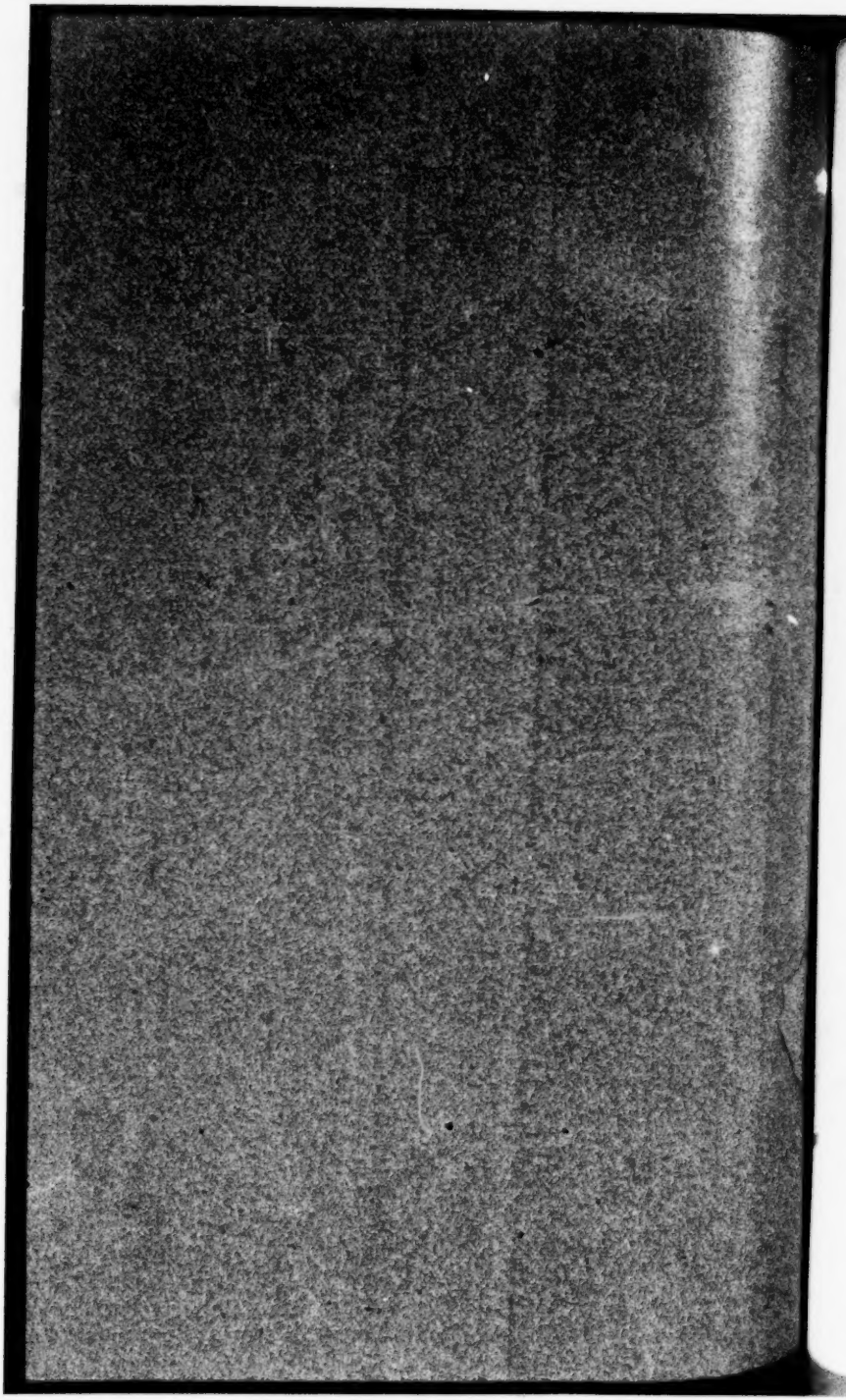

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 406.

FREDERICK A. HYDE, APPELLANT,

vs.

JOHN H. SHINE, UNITED STATES MARSHAL IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA, ET AL.

Appeal From the Circuit Court of the United States for the Northern District of California.

Supplemental Brief on Behalf of the Appellant in Reply to the Supplemental Brief Filed on Behalf of the Appellees.

We will take up in their order and consider the points made by the counsel for the appellees in their supplemental brief.

1. As to "The Usual Mode of Process."

The counsel for appellees have contended under this head that under the New York and California Codes and practice, if a preliminary examination was in progress before a magistrate for an offense against the State, and pending such examination an indictment should be found in the

county where the examination was being held, or in some other county of the State, and should be presented to the magistrate, he would thereupon cease further proceedings and hold the party to answer the indictment, and argue from this premise that if an examination was being held for an offense against the United States alleged to have been committed in some other district or State, the same practice should prevail.

Assuming that the practice under the codes mentioned is accurately stated above, it by no means follows that the same practice would prevail where the examination was being held for an offense against the United States.

That practice is based upon a provision of the Code authorizing the issue of a bench warrant in one county to any other county in the State and an arrest and removal by virtue of that bench warrant to the county where it issued. There is no statute of the United States authorizing the issue of a bench warrant by a court in one judicial district of the United States to be executed in another. No such practice has ever obtained in the Federal courts. It would be in contravention of the provisions of section 1014, which provides for arrest and holding to bail where the accused is found in a district other than the one where the crime is alleged to have been committed.

To insist that such practice should prevail in the latter case would be to contend that an indictment found in one Federal jurisdiction is conclusive evidence of probable cause in another district, although it might be in a different State and thousands of miles away. Indeed, the whole contention of counsel for appellees under the head we are now considering is to the effect that an indictment is conclusive evidence of probable cause. Such a holding would be that the proceeding under section 1014, where an indictment had been found in the foreign jurisdiction, is a ministerial instead of a judicial proceeding; but the whole line of decisions construing that section, from the case of In re Buell,

in 3d Dillon, down to the latest decision upon the subject, is to the contrary of that contention.

The learned counsel for the appellees make an effort to overcome the reasoning of Judge Brown in the Greene case, and of the other courts whose opinions he cites as authority in his opinion in that case. But the rule of decision is too firmly established and is supported by too cogent reasons to be thus overcome. In the Fowkes case (49 Fed. Rep. 50) an indictment had been found in Missouri and presented in Philadelphia. The district judge heard evidence on behalf of the defendant, contradicting the indictment upon both the points of jurisdiction and probable cause, and discharged the prisoner, and his action in that regard was approved by the Circuit Court of Appeals (53 F. R. 16).

In that case the evidence introduced on behalf of the defendant tended to show that the acts with which he was charged in the indictment did not constitute a crime under the interstate commerce law, and also that if he was guilty of any offense it was committed in Pennsylvania and not in Missouri. It appears by the report in that case that after such evidence was given on behalf of the defendant the district judge gave the Government permission to offer evidence tending to controvert those facts, which it failed to do. The case at bar presents a similar situation. Here evidence was introduced on behalf of the defendants which, if true, conclusively shows that the offense, if any, charged in the indictment, was not committed in the District of Columbia, but in California, and also that the evidence before the Commissioner showed want of probable cause. The Government introduced no evidence upon either of those points, except the indictment, which was impeached by the evidence on behalf of the defendants. The principle of the Fowkes case applies here with great force, and has been referred to with approval in many subsequent cases, which will be found under the second point in our original brief, pages 31 to 39.

We also refer to the case of In re Richter, 100 Fed. Rep. 295, in this connection, omitted by inadvertance from our original brief. In that case Judge Seaman, recently promoted to be circuit judge, delivered a strong opinion, which supports our contention and is especially applicable in several particulars to the case at bar.

We refer especially to the quotation from the opinion of Mr. Justice Jackson, In re Greene, 52 Fed. Rep. 104, on page 37 of our brief, and also the quotation from the opinion of this court in Greene *vs.* Henkel, on pages 38 and 39 thereof.

We also refer in this connection to the quotation from the opinion of Mr. Justice Brewer in Beavers *vs.* Henkel, on the fortieth page of our brief, in which, in construing section 1014, he says: "*The removal is made a judicial rather than a mere ministerial act,*" which would not be so if an indictment was conclusive evidence of either jurisdiction or probable cause.

Attention is also called to the other language of that learned Justice in the same case, found on page 40 of our brief, where he says: "*It may be conceded that no such removal should be summarily and arbitrarily made,*" which would not be true if the judge was bound to issue his warrant of removal upon presentation of an indictment and proof of identity without looking behind it for any purpose.

It is also suggested by counsel for appellees under this head that wherever there has been an inquiry going back of an indictment it has been "at the habeas corpus stage of the proceedings" (see their supplemental brief, p. 4). What applicability that suggestion has to this case we are at a loss to understand, for our case has reached the habeas corpus stage, and we are considering what it is proper for the court to do in such a case upon habeas corpus. No case has been cited, and we confidently assert that none can be, where it has ever been held by any Federal court that an indictment in a proceeding under section 1014 is conclusive evi-

dence of jurisdiction or of probable cause. It would be a dangerous and oppressive doctrine to establish. Under the operation of it a party might be removed across the continent without any inquiry as to whether the court in which the indictment was found had jurisdiction to try the case, or whether there was probable cause to believe the accused guilty of any offense, and this, too, although the party may never have been in the State or district where the indictment was found. Congress has wisely provided, by section 1014, for a judicial investigation preceding any such removal. Nor is there anything in the cases In re Ellerbe, 13 Fed. Rep. 530, and United States *vs.* Yarborough, 122 Fed. Rep. 293, seriously contravening the position we take. Those opinions deal wholly with the duty of a commissioner in States where there is no statute giving the defendant the right to introduce evidence upon the question of probable cause. Nothing is said in them about the powers or duties of the district or circuit judges upon habeas corpus in such cases. And in the case last cited the judge refers to many cases, including most of those cited in our brief, for the rules and principles governing in removal cases. It seems, therefore, that he did not intend to lay down any new or different rule in that case from what had been determined in the cases to which he refers.

The distinguished counsel also criticise the opinions of the courts in the cases to which we refer, in the following language: "The consideration which has influenced courts to find reasons for the contrary view (i.e., that a removal should not be made until after a judicial investigation) is the question of remoteness from the place of trial, the unnecessary fear or suspicion that in a distant part of the country the people and the courts are less reliable and may indict without warrant and condemn unjustly" (Appellees' Supplemental brief, pp. 8 and 9), and suggest that such reasons are without foundation.

The proceedings in this case, however, are not calculated

to allay such fears and suspicions. It is apparent from the matters alleged in the indictment that it would have been as convenient and not more expensive for the Government, if the appellant was guilty of any offense, to have indicted and tried him on the Pacific coast as in the District of Columbia; and yet, for some reason undisclosed, the effort is made and pressed with a pertinacity rarely equaled, to remove him three thousand miles to the District of Columbia for trial. What other motives can actuate the prosecution than a desire to render a defense on the part of appellant as difficult as possible, and a belief that a conviction in the District of Columbia could be more readily had than on the Pacific Coast?

But counsel are mistaken in supposing that the reasons recited in the above quotation are all that are given by the courts for requiring a judicial investigation before removal. An examination of the cases we have referred to shows that the courts have also referred to the facts of the enormous inconvenience and expense to which a party is subjected by removing him to a distant jurisdiction for trial as amongst the most vital considerations, and they are illustrated by the case now before the court. The expense to the appellant involved in a trial in the District of Columbia, as shown not only by the undenied allegations of his petition, but which must be apparent to the court without any allegation in that direction, would be such as might in itself preclude him from having a fair and impartial trial. The inconvenience and perhaps impossibility of obtaining the attendance of witnesses at so great a distance from their homes are also matters to be considered.

Nor is there any presumption, as stated by appellees' counsel, that the district judge found probable cause. On the contrary, from his opinion it is clear that he did not do so. If he had said so in so many words in his opinion, it could not be plainer to that effect than it now is, and the opinion of the circuit judge in this particular is precisely

the same. No man can read them without reaching the conclusion that they negative the idea that either of those judges considered the question of probable cause. This is a very different record from the one in Greene *vs.* Henkel, 183 U. S. There this court ascertained from the opinion of the district judge in that case that he did examine the evidence and found probable cause, and that the evidence was not before the circuit court on the application for a writ of habeas corpus, and no effort made to have it produced there. It is clear from the opinion of this court, in the case last cited, that if the evidence had been before the circuit court it would have been the duty of that court to pass upon the question of probable cause, and that this court would also have reviewed that question. Of course, neither court would have weighed the evidence. We do not contend for this. But, as shown under the fourth point in our original brief, it is the duty of the court to look into the evidence for the purpose of ascertaining whether there is sufficient evidence upon which a finding of probable cause could properly be based.

The inference is sought to be drawn that the evidence was in fact before the court upon the application for the writ of habeas corpus, and that it must be presumed that the court examined the evidence and determined that upon the evidence there was probable cause. I am informed that, as a matter of fact, the evidence was not before the court upon the application for the writ of habeas corpus. It certainly is not in this record, and the record is certified to by the clerk of the court under his official seal as complete. The certificate reads:

> "I, Southard Hoffman, clerk of the Circuit Court of the United States of America of the Ninth Judicial Circuit, in and for the northern district of California, do hereby certify the foregoing one hundred and forty-one (141) pages, numbered from 1 to 141 inclusive, to be a full, true, and correct copy of

> the record and the proceedings in the above and therein entitled matter, as the same remains of record and file in the office of the clerk of said court."

Unless, therefore, the clerk of the United States court has been guilty of gross malfeasance in office and has made a false certificate there was no transcript of the evidence before the court upon the writ of habeas corpus.

But, it is urged, that because the petition states that the evidence is made a part of the petition it must be conclusively presumed that it was made part of the petition and that this court must shut its eyes to the true state of the case. We most respectfully submit that this would be to substitute technicality for substance. It is to be borne in mind, in the first place, that the petition for the writ of habeas corpus is a matter of strict right; that we are not appealing to the indulgence of the court; that we are standing upon the rights guaranteed to every American citizen by the Constitution and the law of the land. Nothing is more sacred than the right to the writ of habeas corpus.

In the second place it is to be borne in mind that a petition for a writ of habeas corpus is necessarily drawn in great haste and under circumstances of great excitement. It is no academic question which counsel have to determine when they apply for the writ of habeas corpus. It is a matter of the utmost urgency.

In the case at bar the unfortunate prisoner within one hour after the signing of the warrant for his removal might have been in the custody of the United States marshal upon the overland limited on his way to Washington, being dragged away from his family, his home, his counsel, and his witnesses. Haste was essential. If, therefore, by inadvertence the lawyer drawing up this petition put in the words, "It is hereby made a part hereof," can it be that by reason of that inadvertence this petitioner is to lose his Constitutional right of a review by the circuit court and a re-

view by this court of the merits of his imprisonment and removal? And in the third place it is to be borne in mind that even if the hundreds of pages of testimony taken before the committing magistrate had been physically attached to this petition, that would have been a mere work of supererogation on the part of the petitioner, since the stenographer's minutes are not official nor conclusive upon either party. They may be full of errors and mistakes and omissions. There is no statutory requirement for stenographers' minutes before a committing magistrate, nor do they import verity. The petitioner was entitled, as a matter of statutory right, to the writ of certiorari to bring up the real record. The only function to be performed by annexing the stenographer's minutes would have been to give the circuit court a clearer idea of the questions which the petitioner sought to raise. However this may be, we recur again to the fact that the record as sent up to this court, and as certified to by the clerk of the court, does not contain the testimony or any part of it. That the clerk of the court certifies in effect that the testimony was not before the circuit judge, and the question then recurs, are we to be thrown out of court and refused a hearing because of the inadvertent use of the words in the petition "which are hereby made a part hereof"?

It is further to be observed in this connection that it is not stated that the stenographer's minutes are annexed to the petition, but simply that those minutes are referred to and made a part hereof. Evidently what the draftsman of the petition had in mind was, that as matter of law he was entitled to have the circuit court examine the proceedings before the committing magistrate, and his reference to the testimony was merely a reference to the power and duty of the circuit court to examine into that testimony.

If there be any question on this branch of the case, so far as the record is concerned, this court can, as suggested by Mr. Justice Brown at the argument, issue its own writ of cer-

tiorari to bring up the record from the court below. It was decided in the cases of Ex parte Bollman and Ex parte Swartout, 4 Cranch, 75, that this court could issue its own writ of certiorari when necessary to review the decision of the court below.

If that be correct, in our view of the effect of our petition, and in our construction of the statute, then it was the duty of the court below to issue the writ of habeas corpus and the writ of certiorari, and to examine into the question of probable cause, and the decision of the court below must be reversed.

2. "As to Excursions Outside the Record."

Under this head the counsel for appellees complain of our strictures upon the indictment because it alleges substantially a conspiracy amongst the defendants to bribe the forest reserve officers to favor them in recommending locations of forest reserves which the proclamations of the Presidents, of which the court takes judicial knowledge, show were made years before the alleged date of the conspiracy.

There is no allegation in the indictment about any forest reserves except those mentioned in the overt acts, and the clear and unavoidable inference is that those are the only ones referred to in the indictment. But to extricate themselves from the dilemma in which they are, counsel now suggest that those allegations refer to forest reserves that were to be established in the future, not specially mentioned in the indictment by name, and yet in their brief they make no reference to any forest reserves established in either of those States after the date of the alleged conspiracy to which it could have referred, although if there be any such, reference to the Presidential proclamation establishing them might readily have been made. It is too clear for comment that the forest reserves intended are those, and those only, referred to in the overt acts in the indictment, and that the indictment alleges a supposed con-

spiracy impossible from the very nature of things to have been entered into by the defendants in the indictment, thereby, if not absolutely in itself invalidating the indictment as a whole, throwing such a cloud of suspicion over it that no court or judge should transfer parties for trial three thousand miles away without making a very close inquiry into the questionsof jurisdiction and probable cause.

In response to the suggestion of counsel on the other side that the proper time to raise the point involved in this consideration is at the trial, we reply that inasmuch as that allegation is false, as demonstrated by the facts of which this court must take judicial notice, we have the right in this removal proceeding to impeach the indictment by calling attention to it.

Nor is the conclusion of counsel for appellees, that Dimond was manifestly residing in Washington much of the time covered by the alleged conspiracy, correctly stated. The only thing in the indictment other than the fiction alleged therein, that he conspired with the other defendants in the District of Columbia, to indicate that he was here during any of the time, is the fact that some of the letters which it is alleged he wrote as constituting some of the overt acts appear to bear date in Washington. The earliest of those is dated October 24, 1901, and the latest May 13, 1902, covering a period of a little less than seven months. All the other letters alleged in the indictment to have been written by him purport upon their face to have been written in San Francisco.

3. "The Contents of the Indictment."

Under this head the learned counsel renew their eulogies of this instrument, and the "skill," "accuracy," and "brevity" of the pleader. The three judges who have had occasion to pass judicially upon the instrument, however, do not agree with our learned adversaries or the pleader,

and we content ourselves in this connection with again calling the attention of the court to the fact that each one of those judges has held that the indictment does not charge that it was in the contemplation of the alleged scheme of the defendants to obtain patents from the States in the names of fictitious persons, but that taken together and construed as a whole, the evident intention of the pleader was to allege that they were to obtain patents from the States in the names of real persons by fraudulent means, and convey the titles so obtained to the United States.

Now, finding it impossible under such an allegation to show that the United States would be defrauded, the effort of the Government is, by shrewd analyses and far-fetched inferences, to draw from the indictment a conclusion that the patents were to be obtained in the names of fictitious persons. In order to do this the astute counsel for the Government have resorted to analyses of the indictment by segregation, taking a portion of the language of the indictment by itself and considering it separate from all the other allegations of that instrument. This is apparent from their analyses printed as an appendix to their original brief. But this is in contravention of one of the plainest rules of construction, especially as applied to a criminal pleading. In order to determine what the pleader has charged the *whole indictment must be taken and considered together*, and that is what the judges who have already had to deal with it have done; and we respectfully submit that when the indictment is so considered no other interpretation can properly be placed upon it than that which has been given it by those judges, and the analysis to which we have submitted the indictment as a whole in our brief supports and reinforces this conclusion of the judges. (See our original brief, pages 56 to 65, inclusive.)

Again, the contention of counsel for the Government is that it may fairly be *inferred* from the indictment that the pleader intended to make this allegation; but we are not

to lose sight in this connection of the rule of criminal pleading, so often stated by this court, that charges of an offense in an indictment are not to be by the way of inference, but that, in order to comply with the constitutional requirement, the allegations must be direct, positive, and certain (see United States *vs.* Cruikshank, and United States *vs.* Hess, and other cases in this court cited in our original brief, page 79 et seq.).

Another familiar rule to be applied here is that the language of a pleading is to be construed most strongly against the pleader, and this is especially true of an indictment.

4. Alleged "Forged Conveyances."

What we have said under the last head applies with equal force here. It will not do to take a few sentences from the indictment, in order to determine its scope and allegations, but the whole must be taken together.

5. "Hyde's Claim of Alibi."

Under this head the counsel for appellees actually make the attempt to argue that appellant is a resident of the District of Columbia, and the only thing they have to base that argument upon is that the indictment alleges that he entered into a conspiracy in the District of Columbia. Then they argue that because he did enter into a conspiracy in this jurisdiction, he is a resident here. As a premise to support this argument they assume that the allegation of the indictment in that regard is true, when this record shows it to be false, and a mere fiction of pleading. The allegation of the petition is that the appellant is a resident of the State of California, and was not within the District of Columbia at any of the times in said indictment set out. This is a clear, direct, positive, statement of a fact, in a petition for a writ of habeas corpus, and presents a fact

which the petitioner had the right to have inquired of by the court upon that writ. That that allegation is to be taken as true upon this hearing is the settled law of this court, as shown by the authorities referred to in our original brief, pages 27 and 28. The further allegation of that petition is that the evidence introduced before the Commissioner proved that state of facts. This situation brings the case precisely within the rule laid down in the Fowkes case, *supra*, and entitled the petitioner to his discharge upon failure of the Government to introduce evidence other than the indictment tending to show that the appellant was actually in the District of Columbia and entered into a conspiracy here. It is not contended that the Government is bound to prove the conspiracy on the exact days alleged in the indictment. But our contention is that the petitioner having shown by the allegations of his petition and otherwise that he was not in the District of Columbia on any of the dates mentioned in the indictment as dates of the alleged conspiracy, and that he never was in said District except for the brief space of six hours, and then did none of the acts alleged in said indictment, a *prima facie* case of want of jurisdiction in the Supreme Court of the District of Columbia was thereby made, which required the court below to grant the writ of habeas corpus and upon the return to inquire into the jurisdiction of the court in which the indictment was found to try the offense charged therein. Upon the hearing it would have been competent for the petitioner to have proved the facts alleged in his petition negativing jurisdiction. The Government also might have introduced evidence to prove that appellant was in the District of Columbia and entered into a conspiracy on any date mentioned in the indictment, or any other date, if it had any evidence of such facts. But it had none, and therefore resisted the issue of the *habeas corpus*, and contended for the removal of the appellant upon the fictitious allegations of the jurisdictional facts alleged in the indictment, which the petitioner had proved

before the Commissioner to be false, had alleged in his petition to be false, and could have proved to be false upon the hearing of the writ of habeas corpus, if the return to such writ had traversed the allegations of the petition; and if the Government had had evidence to prove the jurisdictional facts, its counsel would doubtless have let the case take that course. But it had and has no evidence tending to prove that appellant, at any time, entered into any conspiracy in the District of Columbia.

The learned Solicitor-General substantially admitted in his oral argument that the Government had no such evidence, when he stated that conspiracies are generally proven by the acts of the alleged conspirators and not by any direct evidence of an express agreement, which is a familiar rule with which all courts are acquainted. And in their supplemental brief counsel for the Government make the same admission where they state on page 17, substantially, that most conspiracies must be proved by a series of overt acts. It is, therefore, substantially admitted, and if it were not, under the circumstances, this court is bound to presume that the Government had and has no evidence by which it can prove, or expects to prove, an express agreement of conspiracy amongst the defendants in the indictment entered into in the District of Columbia. How, then, must the Government attempt to prove this conspiracy? Of course, the plain answer is that it can only be done by offering evidence tending to prove the various acts of the alleged conspirators in the supposed accomplishment of the objects of the alleged conspiracy.

These acts from the very necessity of the case would be those by which the defendants in the indictment are alleged to have obtained the title to the school lands from the States of California and Oregon, which of course were performed in those States, and their acts in conveying those titles to the United States and making applications for the lieu lands, all of which were done, as shown by the allega-

tions of the indictment itself, in the States of Oregon, California, and Washington. In other words, the circumstantial evidence that would be offered to establish the alleged conspiracy, if it were sufficient to establish a conspiracy, would necessarily show that it was entered into in California or Oregon, and not in the District of Columbia. Each of those acts would be an overt act, and therefore the first overt act would be located where the conspiracy was, to wit, in California or Oregon. It is, therefore, clear that the evidence of the Government itself when introduced would conclusively show that the Supreme Court of the District of Columbia has no jurisdiction in the premises.

That the conspiracy is the offense, and that the overt acts are no part of it, is firmly established by the decisions of this court cited in our original brief, pages 19 to 25.

6. "The Law of Conspiracy."

The effort is made by the counsel for appellees under this head in their supplemental brief to show that by some fiction of pleading the Supreme Court of the District of Columbia might have jurisdiction, but what has been said under the last head shows that this is impossible. It was claimed in their original brief that the doing of a single overt act by one of the alleged conspirators in the District of Columbia would give the Supreme Court of that District jurisdiction, notwithstanding the conspiracy was actually formed on the Pacific coast. Our brief and argument upon this point (pages 39 to 44, inclusive) shows conclusively the error of that position, and so clearly that our opponents have been compelled to change their position upon that subject, and they now admit in their supplemental brief (p 17) that one overt act would not be sufficient to transfer a previously existing conspiracy from the jurisdiction where formed to the jurisdiction of the overt act, but that in order to to show the conspiracy in opera-

tion in the other jurisdiction there must be a series of overt acts in that jurisdiction. In other words, in order to show a conspiracy in any jurisdiction by overt acts the evidence must show a sufficient number of overt acts, and the character of them must be such that a jury could be permitted to find the existence of a conspiracy from them. Apply that rule to this case. What overt acts are alleged to have been committed in the District of Columbia? The only ones are the letters written by Dimond and the money paid by Benson. The former were and are entirely innocent acts in themselves. They have no tendency whatever to prove a conspiracy. The only other overt acts alleged in the indictment to have been performed in the District of Columbia are the payment by Benson of money to Harlan and Valk. It is contended by Benson's counsel that those were innocent acts because under the circumstances not bribery, nor an attempt to bribe; but if it should be held that those acts were bribery, they have no tendency in and of themselves to prove a conspiracy, nor would those overt acts alleged to have been done by Benson and the overt acts alleged to have been done by Dimond, combined, have any tendency to prove a conspiracy. No court would permit a jury to find a conspiracy from those acts alone. Those are the only overt acts which the indictment alleges were performed in the District of Columbia, and from the nature of the allegations of the indictment it is clear that all other acts of the various defendants in the indictment were performed on the Pacific coast. It is clear, therefore, that the overt acts alleged to have been performed in the District of Columbia would be wholly insufficient to submit to a jury upon the question of the existence of a conspiracy. That could only be done, if at all, upon the acts done by the various defendants in the States of Oregon, California, and Washington. What clearer demonstration could there be that the Supreme Court of the District of Columbia, under the decisions of

this court that the conspiracy and not the overt acts is the offense, has no jurisdiction of the supposed offense charged in this indictment?

7. Conclusion.

It is to be remembered that appellant is not a fugitive from justice. He has committed no criminal act in the District of Columbia, nor is it, nor can it be, seriously claimed that he was personally present in the said District when any others of the defendants are alleged to have committed any such acts. The allegations that he committed any offense against the laws of the United States in the District of Columbia are purely a fiction of pleading, based upon the odious and dangerous doctrine of "*constructive presence*," condemned by Chief Justice Marshall in the Burr case as having no place under our Constitution in a case like the present one.

As was said in the closing oral argument in this case:

> "In conclusion we only desire to call the attention of the court once more to the proposition that we are here seeking the protection of our client for his substantial rights as guaranteed to him by the Constitution. We are not seeking to secure for him immunity from trial in the proper forum. Nobody disputes that during all these years he had been liable to indictment in the State court of Califoruia, where he resides, if he was guilty of any one of the charges made in this indictment. It is not disputed by the Government that he was indictable at any time during the period covered by this indictment by the district or circuit court of the United States for the Northern District of California, where he resides. Why, then, has the Government chosen to have him indicted here? Why is he to be taken from his home, compelled to travel these 3,000 miles, bring with him over 100 witnesses, at an expense of over $30,000, in

order to establish his innocence of these alleged crimes? Let it not be overlooked that the Government has, by this drag-net indictment, compelled these defendants to be prepared to defend hundreds or thousands of transactions. The Government itself may, it is true, when it comes to the trial, elect to try but one. It is, therefore, a matter of comparative indifference, so far as convenience is concerned, whether the Government tries the case here or in California. On the other hand, the defendants are obliged to be prepared with witnesses to establish their innocence in these hundreds and thousands of transactions, and can take nothing for granted. The only possible reason for bringing these defendants to this District is the fear of the Government that a jury of their own vicinage may acquit them. That is the very thing which the Constitution of the United States says the Government has no right to consider. A jury of the vicinage is the very tribunal which the Constitution designs that a defendant shall have for his protection—a jury of the vicinage where the man has lived, where his character is known, and where he has a fair show for his life and his liberty. The whole history of the struggle against arbitrary imprisonment by our Anglo-Saxon ancestors and our American ancestors has been against the attempt of the Government to obtain an unfair advantage of the prisoner. The Star Chambers and the Jeffreys have all insisted that they were only seeking the administration of justice. They have been seeking to prevent any guilty man from escaping, but the law says it is better that ninety-nine guilty men should escape than that one innocent man should be punished; and the law says and the Constitution says that a man's life and a man's liberty shall not be put in jeopardy except before a jury of the vicinage where his alleged crime is claimed to have been committed.

"We stand upon our constitutional rights in this case. We ask no favor, but we do insist that if there

be any room for doubt, and if your Honors are uncertain as to any proposition of law in this case, it is your duty to resolve that doubt in favor of the prisoner and against the Government. That is what courts are for in our country, and under our Constitution—not to aid the Government in prosecuting criminals, but to aid the citizens of the United States against unjust proceedings, unjust arrests, unjust removals, and possibly unjust convictions."

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Counsel for Appellant.